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PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and the Individual Members of the Medical Licensing Board of Indiana respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit panel opinion, App. 1a, is reported at 888 F.3d 300 (7th Cir. 2018). The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for summary judgment, App. 48a, is reported at 265 F. Supp. 3d 859 (S.D. Ind. 2017). The district court order granting Planned Parenthood's motion for preliminary injunction, App. 76a, is reported at 194 F. Supp. 3d 818 (S.D. Ind. 2016).

JURISDICTION

A panel of the Seventh Circuit entered judgment on April 19, 2018. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which the Court of Appeals granted on June 8, 2018. App. 127a. On June 25, 2018, however, the Court of Appeals, owing to the recusal of a judge who had voted for *en banc* rehearing, issued an order vacating *en banc* rehearing and reinstating the panel opinion and judgment. App. 114a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions at issue are reprinted in the appendix. App. 131a.

INTRODUCTION AND STATEMENT OF THE CASE

In early 2016, the Indiana General Assembly passed a bill regulating abortion and its aftermath. At issue here are provisions outlawing discriminatory abortions (and requiring that abortion patients be told of that prohibition) and mandating that fetal remains be disposed of the same way as other human remains, *i.e.*, through burial or cremation rather than with medical waste.

The district court enjoined each of these laws, and a panel of the Seventh Circuit affirmed over a partial dissent by Judge Manion, who would have permitted to law governing disposition of fetal remains to go into effect. Because the panel opinion created a circuit conflict on the disposition issue, the defendants asked for *en banc* rehearing, which the Seventh Circuit granted. Several weeks later, however, the court vacated rehearing and reinstated the panel opinion when Judge Scudder, who had voted for *en banc* rehearing, recused himself, leaving the court equally divided.

Notably, the Seventh Circuit's ultimate order denying *en banc* review was accompanied by opinions from two separate minority factions of the court—opinions that help illuminate the cert-worthiness of the issues presented.

First, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that she, too, would vote to invalidate the fetal remains provision, but on grounds

other than those given by the panel majority. Where the panel majority thought requiring fetal remains to be treated like other human remains fails the rational-basis test because a fetus is not a person for purposes of the Fourteenth Amendment, Chief Judge Wood would have declared it an undue burden on the right to abortion.

Second, Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, would have upheld the fetal remains provision because—as the Eighth Circuit has previously held—the State may act to preserve the human dignity of the fetus notwithstanding its Fourteenth Amendment status. Judge Easterbrook further disagreed that the fetal remains provision imposed an undue burden on the right to abortion. Judge Easterbrook also expressed skepticism that Indiana's "anti-eugenics law" is invalid, as "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a. Indeed, "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a. Judge Easterbrook concluded, however, that "[o]nly the Supreme Court can determine the answer." App. 122a–23a.

This extraordinary procedural saga, the multiplicity of irreconcilable judicial opinions the case has generated, the inescapable conflict with the Eighth Circuit that now exists, and the overall national importance of the issues presented all justify Supreme Court review.

I. The Fetal Disposition Provision

The first provision of House Enrolled Act (HEA) 1337 at issue here is the requirement that fetal remains be disposed of the same as the remains of any other human being. The premise of that regulation is that an aborted or miscarried fetus is nothing less than the remains of a partially gestated human and should be treated with the same dignity. When in 2015 an Indiana medical waste disposal company was caught disposing of fetal remains it received from abortion clinics, the legislature decided it was time to ensure that health care facilities treated fetal remains with human dignity. Tony Cook, *Indiana Medical Waste Firm Fined for Handling Fetal Tissue*, Indianapolis Star, Feb. 17, 2016, https://bit.ly/2OnYkCJ.

Accordingly, HEA 1337 alters how health care professionals must handle fetal remains, whether due to abortion or miscarriage. It requires that an abortion clinic or other healthcare facility "having possession of an aborted fetus shall provide for the final disposition of the aborted fetus." Ind. Code § 16-34-3-4(a). The remains "must be interred or cremated," which can include "simultaneous cremation" of aborted fetuses. *Id.* Similar provisions are in place for the disposition of miscarried fetal remains. Indiana Code section 16-21-11-6 provides that "[a] health care facility having possession of a miscarried fetus shall provide for the final disposition of the miscarried fetus. . . . which must be cremated or interred." Alternatively, the pregnant woman may choose to handle the disposition of the fetus herself. *Id.* § 16-34-3-2(a).

II. The Non-Discrimination Provision

The other provision of HEA 1337 at issue here provides that "[a] person may not intentionally perform or attempt to perform an abortion . . . if the person knows that the pregnant woman is seeking" an abortion solely on the basis of the race, sex, or disability of the child. Ind. Code §§ 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8. It requires doctors to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." *Id.* § 16-34-2-1.1(a)(1)(K). The statute exempts cases of lethal fetal anomalies, *id.* § 16-34-4-1(b), defined as "a fetal condition diagnosed before birth that, if the pregnancy results in a live birth, will with reasonable certainty result in the death of the child not more than three (3) months after the child's birth." *Id.* § 16-25-4.5-2.

Over the past decade, technological advances have improved both the accuracy and availability of prenatal testing that screens for Down syndrome and other fetal abnormalities. The use of cell-free DNA testing has greatly expanded the availability of prenatal testing during the first trimester. Today, due to these advances in non-invasive testing, the American Congress of Obstetricians and Gynecologists (ACOG) recommends that *every* pregnant woman undergo testing for Down syndrome regardless of her age. Many women rely on screening tests to make decisions about abortion, and the general consensus is that the abortion rate for fetuses with Down syndrome is very

high. *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 Prenatal Diagnosis 142, 150 (Feb. 2012) (reviewing the published literature on termination of pregnancies after a diagnosis of Down syndrome and finding 67% termination rate in population-based studies, 85% in hospital-based studies, and 50% in anomaly-based studies).

Moreover, physician pressure to abort an abnormal fetus is common. One Indiana woman described feeling "bullied" by her doctor when informed that her baby was at high risk for several genetic conditions, with the doctor telling her that "the baby is in pain and dying," that she "should get an abortion," and that "the best thing that [she] could do as a mother was abort." Appellants' App. 93. Another Indiana woman was pressured to have amniocentesis in her 19th week of pregnancy after an ultrasound showed that one of the twins she was carrying had an enlarged head. She "realized that the doctor was really saying that our baby had a disability and we need[ed] the amniocentesis that day so we could terminate our pregnancy before I reached the 20th week of pregnancy." Appellants' App. 97.

The Indiana legislature responded to the alarming trend of disability-selective abortions by enacting the fetal disposition provision, which prohibits such discriminatory abortions. The primary enforcement mechanism is the requirement that doctors inform women that Indiana does not allow abortions performed solely on the basis of the race, sex, or disability of the fetus. *See* Ind. Code § 16-34-2-1.1(a)(1)(K).

III. The Decisions Below

1. Planned Parenthood brought suit in the Southern District of Indiana seeking a declaratory judgment that HEA 1337 is unconstitutional. After first issuing a preliminary injunction against both the fetal remains disposition statute and the discriminatory abortion statute, App. 113a, the district court, on cross-motions for summary judgment, issued a permanent injunction "prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions." App. 74a.

The district court invalidated the fetal tissue disposition provision under the rational-basis test, concluding that the State's asserted interest in treating fetal remains the same as other human remains was not legitimate because the Supreme Court has held that, for purposes of the Fourteenth Amendment, a fetus is not a person. App. 69a. It also invalidated both the anti-discrimination provision and related physician-disclosure provision in view of "well-established law that precludes a state from prohibiting a woman from electing to terminate a pregnancy prior to fetal viability." App. 74a. "Given the categorical nature" of the abortion right, "any type of outright ban

on pre-viability abortions is unconstitutional." App. 60a–61a.[1]

2. The Seventh Circuit affirmed 2–1 on the fetal remains statute and 3–0 on the anti-discrimination statute.

As to the fetal disposition provisions, the majority opinion acknowledged that the provisions do not affect a fundamental right, but concluded that they are nevertheless unconstitutional for essentially the same reason articulated by the district court—because a fetus is not a person under the Fourteenth Amendment. It said that under *Roe v. Wade*, 410 U.S. 113 (1973), "the law does not recognize that an aborted fetus is a person," such that "the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate." App. 16a. The panel distinguished *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), because "while Minnesota focused on the interest of the *public*, Indiana focuses on the interest of the *fetus*." App. 18a (emphasis in original). The majority also considered it un-

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[1] Following the district court's initial entry of final judgment, the parties filed a Joint Motion to Alter or Amend Judgment urging the court to clarify whether it intended also to enjoin enforcement of the fetal tissue disposition provisions pertaining to miscarriages and requesting that the Court clarify that its judgment and injunction apply only to *pre-viability* abortions and miscarriages. Appellants' App. 310–14. The district court granted the motion, *id.* at 315–16, so that the final judgment enjoined all of the fetal tissue disposition provisions as applied to pre-viability abortions and miscarriages only.

constitutionally irrational for the State to impose fetal-disposition regulations on healthcare providers while affording the mother of an aborted or miscarried fetus the right to dispose of the fetal remains without restriction. App. 18a–19a. Finally, it concluded that permitting simultaneous cremation of fetal remains, but not the remains of born-alive humans, is an unconstitutionally irrational means of advancing the government's stated interest. App. 19a.

With respect to the non-discrimination provision, the majority said that the statute violates a woman's Fourteenth Amendment right to terminate her pregnancy prior to viability. Because the non-discrimination provision is an "absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State," it is "therefore, unconstitutional." App. 11a. The court rejected the State's theory that *Casey* protects only a woman's binary choice whether or not to have a child (not a choice of which child to have) because "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability." App. 13a.

In a separate opinion, Judge Manion concurred in the judgment with respect to the non-discrimination provisions because "Supreme Court precedent compels us to invalidate Indiana's attempt to protect unborn children from being aborted solely because of their race, sex, or disability." App. 21a. But he argued that this "absurd result" "reveals two major flaws of

the *Casey* analysis." App. 24a. First, Judge Manion argued, "*Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights." App. 24a. Second, *Casey* "replaced strict scrutiny with an effects-based test that is actually *more difficult* to satisfy in many cases." App. 24a (emphasis in original). For these reasons, Judge Manion "reluctantly concur[red] in the court's judgment" because he had "no choice but to follow Supreme Court precedent," App. 36a, yet urged the Court to ameliorate this extreme outcome dictated by its precedents, App. 24a.

However, Judge Manion dissented from the decision that the fetal disposition provision also violates the Constitution. In his view, the remains-disposition statute "rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn." App. 22a. Judge Manion argued that "[t]he court err[ed] in several respects." App. 37a. First, the panel's decision conflicts with the Eighth Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which "upheld a substantially similar Minnesota law." App. 37a. Second, "the court adopts Planned Parenthood's red herring argument that Indiana cannot require fetal remains be disposed with dignity because unborn children are not persons under the Fourteenth Amendment." App. 37a–38a. Third, "the court departs from traditional rational basis review and requires far too close a fit between means and ends." App. 38a. Finally, Judge Manion

concluded that the panel's errors combined to "produce a result that would never happen in any context but abortion." App. 38a.

3. In view of the conflict with the Eighth Circuit, the State petitioned for rehearing *en banc* on the remains-disposition issue, which the Seventh Circuit granted on June 8, 2018. But two weeks later the court reversed itself and denied the petition when Judge Scudder recused himself and the votes for rehearing *en banc* were no longer present. App. 114a–15a. The result is that the panel decision was reinstated by an equally divided court, with Judges Easterbrook, Kanne, Sykes, Barrett, and Brennan voting to grant rehearing *en banc*.

Chief Judge Wood, joined by Judges Rovner and Hamilton, issued an opinion concurring with the court's decision to deny the petition, arguing that the undue-burden test, rather than the rational-basis test, should have been applied to the fetal disposition provision, even though Planned Parenthood conceded that rational-basis review was applicable. App. 117a. Because "[t]he disposal of an aborted (or miscarried) fetus is just the final step in the overall process of terminating (or losing) a pregnancy," Chief Judge Wood argued, "[i]t thus implicates an interest with heightened constitutional protection." *Id.* Under the undue burden test, she said, the court would need to explore the costs imposed by the fetal disposition provision on women. These costs include "not only a higher out-of-pocket dollar price for the procedure," but also "psychological trauma that chills women from seeking abortions or medical care in relation to miscarriages

because of the potential stigmatizing impact of these measures" and "how the disposal statute might work in tandem with other regulations in a way that unduly burdens the right to choose." App. 120a. Without further development of the record, Chief Judge Wood concluded, it would be "a waste of this court's resources to accept a case for *en banc* review." *Id.*

Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, issued an opinion dissenting from the denial of rehearing *en banc*, arguing in support of full-court review of the fetal disposition provision and recommending cert on the discriminatory abortion ban. App. 121a. With respect to the latter, Judge Easterbrook expressed skepticism with the panel's conclusion "because *Casey* did not consider the validity of an anti-eugenics law." App. 121a. Because "[w]e ought not impute to the Justices decisions they have not made about problems they have not faced[,] . . . [o]nly the Supreme Court can determine the answer." App. 122a–23a.

Turning to the fetal-disposition issue, Judge Easterbrook opined that "[t]he panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils." App. 123a. He also underscored the conflict with the Eight Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). App. 124a. In Judge Easterbrook's view, "rehearing en banc is preferable to a constitutional decision preventing Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation." App. 125a.

REASONS FOR GRANTING THE PETITION

This case concerns the ability of the State to prevent prenatal discrimination on the basis of race, sex, and disability and to preserve the dignity of fetal remains by ensuring that they are disposed of in the same manner as other human remains. The fetal disposition provision expands on long-established legal and cultural traditions of recognizing the dignity and humanity of the fetus. The non-discrimination provision, on the other hand, is a qualitatively new type of abortion statute that responds to new technological developments allowing women to make a choice not contemplated at the time of *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): the choice of *which* child to bear. Indiana urges the Court to determine whether it may so advance these interests consistent with the Fourteenth Amendment.

I. The Court Should Resolve the Circuit Conflict over the Nationally Important Question Whether States May Require Fetal Remains To Be Handled the Same as Other Human Remains

A. The decision below conflicts with the Eighth Circuit's decision upholding an identical requirement in Minnesota

1. As the dissenting opinions of both Judge Manion and Judge Easterbrook (joined by Judges Sykes, Barrett, and Brennan) recognized, the Seventh Cir-

cuit panel majority, in striking down the fetal disposition provision, created a conflict with the Eighth Circuit's holding in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). *See* App. 39a-40a & n. 11 (Manion, J., concurring in the judgment in part and dissenting in part); App. 124a (Easterbrook, J., dissenting from denial of rehearing *en banc*).

There, the Eighth Circuit upheld a fetal disposition statute "substantially similar in every material respect" to the Indiana law struck down by the Seventh Circuit here. App. 39a (Manion, J., dissenting). Like the Indiana law, the Minnesota law required healthcare providers either to cremate or bury aborted and miscarried fetal remains and exempted women who have miscarriages at home and choose to dispose of the fetal remains themselves. *See Planned Parenthood of Minn.*, 910 F.2d at 488; *see also* Minn. Stat. § 145.1621(3) (applying only to abortions or miscarriages occurring "at a hospital, clinic, or medical facility"). Also like the Indiana law, Minnesota allows for simultaneous cremation of multiple fetuses. *See Planned Parenthood of Minn.*, 910 F.2d at 484; *see also* Minn. Stat. § 145.1621 (making no restriction on group disposal methods).

Applying the rational-basis test, the Eighth Circuit held that requiring that fetal remains be treated the same as human remains is valid. *Planned Parenthood of Minn.*, 910 F.2d at 487. While the Seventh Circuit held that "the State's interest in requiring abortion providers to dispose of aborted fetuses in

the same manner as human remains is not legitimate," App. 16a, the Eighth Circuit said that, even assuming the statute's purpose was to equate fetal remains with human remains, "we do not find it to be an invalid purpose," *Planned Parenthood of Minn.*, 910 F.2d at 487.

And where the Seventh Circuit held that it was irrational for Indiana to exclude individual women from the burial/cremation requirement, the Eighth Circuit held that "given the privacy concerns implicit in activity in one's home," the State had not acted irrationally by regulating the disposal of fetal remains by hospitals and clinics but not by women who miscarry at home. *Id.* at 488.

The five dissenting votes below underscore how these decisions are fundamentally irreconcilable. Judge Manion pointed out in his dissent that "[t]he Indiana and Minnesota laws are substantially similar in every material respect," and "the same state interest is involved in both cases." App. 39a–40a. Similarly, Judge Easterbrook argued that the panel's attempt to distinguish *Planned Parenthood of Minnesota* is unconvincing because "the intent behind a law does not affect rational-basis analysis." App. 124a. He also observed that "to deny that public sensibilities can matter (as the panel did) creates a conflict with decisions in many circuits, on subjects ranging from animal welfare to aesthetic zoning to obscenity." App. 124a.

On the issue of fetal remains alone, Indiana and Minnesota are far from the only States with regulations requiring humane treatment. At least six other States have fetal disposition regulations. *See* Ark. Code Ann. § 20-17-801; La. Rev. Stat. Ann. § 1191.2; N.C. Gen. Stat. § 130A-131.10; Ohio Rev. Code Ann. § 3701.341; Okla. Stat. tit. 63, § 1-301.10; Tex. Health & Safety § 697.004. Accordingly, not only does the panel's decision "prevent Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation," App. 125a, but it also crystalizes for the Court an issue that is important across the country.

2. The Seventh Circuit itself is sharply divided over the fetal remains issue. Even the Seventh Circuit judges supporting the panel majority's conclusion disagree as to why the fetal disposition statute is invalid. And while intra-circuit fragmentation may not justify certiorari in many cases, where, as here, it has led to facial invalidation of an important state law, under circumstances where a fully constituted en banc court is unlikely ever to have a chance to resolve internal tensions, the Court should exercise its discretion to provide a forum for final review of a sovereign State's constitutional defenses.

As described above, the panel majority, consisting of Senior Judge Bauer and Judge Flaum, invalidated the Indiana law using the rational-basis test. App. 19a. Critically, however, in her opinion concurring in the denial of *en banc* review, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that the fetal disposition provision should instead be held to the

more exacting undue burden test that applies to regulations of the abortion procedure itself. *See* App. 117a. In her opinion, "[t]his case involves a fundamental right" even though "the disposal statute operates at the end of the procedure." App. 117a–18a.

So as things stand, Indiana is barred from enforcing the fetal disposition provision because it supposedly violates the rational-basis test, even though perhaps a majority of Seventh Circuit judges in regular active service, plus Judge Manion, may disagree with that holding, and indeed, only one judge in regular active service—Judge Flaum—is on record supporting both the use of that legal standard and the outcome the panel majority reached. Furthermore, given that Indiana is barred by a final judgment and injunction from enforcing the fetal disposition provision, it will be unable to litigate the validity of the statute in another case where Judge Scudder will not be recused.

In short, on this issue, Indiana is dead in the water with substantial doubt about what the full Seventh Circuit thinks. Under these circumstances, only this Court can ensure that Indiana is afforded a full and fair opportunity to make its case. The conflict with the Eighth Circuit, the equal division of the Seventh Circuit on the outcome of the case, and the additional factions even among those supporting the outcome, amply justify Supreme Court review.

B. The fetal remains provision is valid

The panel majority held the State cannot "mak[e] a moral and scientific judgment *that a fetus is a human being*," App. 15a (internal quotation marks omitted) (emphasis by the Court), because in *Roe* this Court "concluded that 'the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,'" App. 15a (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)). And, "[s]ince the law does not recognize the fetus as a person that is simply not a legitimate interest." App. 18a.

This conclusion is a patent *non sequitur*; simply because a fetus is not a person within the meaning of the Fourteenth Amendment does not mean that a fetus is not morally and scientifically human. And because the Indiana legislature reasonably concluded that a fetus is morally and scientifically human, the State is well within its power to ensure that aborted and miscarried fetuses are treated with human dignity, as long as the State does not infringe upon the right to abortion. *See* App. 40a–41a (Manion, J., dissenting).

The government has important interests in protecting fetal life. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) ("The *Roe* Court recognized the State's 'important and legitimate interest in protecting the potentiality of human life.'" (quoting *Roe*, 410 U.S. at 162)); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("[A central premise of *Casey* is] that the government has a legitimate and substantial interest in preserving and promoting fetal life.").

These interests arise because a human fetus alone has the potential to become a unique and independent human person. The same concern for the dignity of what was once a human life underlies the Fetal Disposition Provision. Only fetal remains once had the potential to grow into a fully formed, mature person. Requiring distinctive treatment of fetal remains is therefore a legitimate judgment that the State may carry into effect, so long as it does not interfere with the right to abortion.

Moreover, even disposition of non-human remains are within the regulatory authority of the State. *See* App. 123a (Easterbrook, J., dissenting). Courts routinely uphold statutes aimed at protecting public sensibilities by protecting animal welfare. *Id.* For instance, in *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir.), the Seventh Circuit upheld, on animal welfare grounds, an Illinois statute prohibiting the slaughter of horses for human consumption. App. 123a. If "reducing dismay at poor treatment" of horses is a legitimate government interest, *see* 500 F.3d at 557, then so too is respecting the dignity of fetal remains—or (put another way) reducing dismay at the lack of such respect. App. 123a.

Nor is any imperfect fit between the statute's means and ends fatal. The panel majority held that the Fetal Disposition Provision fails to advance the cause of protecting human dignity because: (1) "it allows a woman full liberty to dispose of the fetus without restriction," and (2) it "continues to allow for mass cremation of fetuses." App. 19a. That reasoning is deeply flawed. As Judge Manion put it, the panel in

effect "objects that the provision is irrational because it doesn't treat unborn children as human enough." App. 42a (Manion, J., dissenting). However, grading the homework of the Indiana General Assembly in this manner "is not how rational basis review works." *Id.*

The Indiana legislature could rationally conclude that fetal remains should be buried or cremated separately from mere medical waste because they are distinct human beings, yet also conclude that differences from adult human remains justify mass cremation. It could also rationally conclude that the sensitive nature of abortion and miscarriage justifies releasing fetal remains to the mother upon request. Needless to say, by permitting aggregation of fetal remains for cremation, the statute moderates the costs it might otherwise impose on abortion providers. It would be odd to say that the statute is unconstitutional because it does not burden Planned Parenthood enough. In any event, the State may pursue like treatment of fetal and other human remains without achieving that perfect result in all ways or in all circumstances.

In concluding that the fetal disposition provision fails rational basis because it does not line up precisely with cremation and burial requirements for adult humans, *see* App. 18a–19a, the panel majority "departs from traditional rational basis review" by "requir[ing] far too close a fit between means and ends." App. 38a (Manion, J., dissenting). Critically, as Judge Manion recognized, the Seventh Circuit has "produce[d] a result that would never happen in any

context but abortion." App. 38a (Manion, J., dissenting).

II. Whether States May Preclude Discriminatory Abortion Based on the Race, Sex, or Disability of the Fetus (Including Down Syndrome) Is a Nationally Important Question Worthy of Immediate Consideration

In his dissent from denial of rehearing *en banc*, Judge Easterbrook expressed substantial skepticism that the fate of Indiana's non-discrimination statute is controlled by *Roe* and *Casey*. Yet he was "content to leave [the non-discrimination issue] to the Supreme Court" because only "the Justices can speak authoritatively." App. 123a. The Court should accept this invitation to provide guidance on what is already a burning national issue.

A. States need to address the newly emergent threat of abortions targeting the race, sex, and disability of the fetus, and the stakes are too high to await further percolation

Estimates show that at least 30% of fetuses diagnosed with Down syndrome were aborted even before the development of non-invasive genetic screening in 2011. Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167A Am. J. Med. Ethics 756, 758 (2015). With new technological developments such as cell-free DNA testing, the

number of fetuses even possibly having Down syndrome that are aborted will likely rise even more. Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear?*, 94 Disease in Childhood 823, 824 (2009). According to Planned Parenthood's own medical director, Dr. John Stutsman, approximately half of all babies with Down syndrome are aborted. Appellants' App. 70. And positive DNA screens frequently lead doctors to encourage or even pressure women to terminate the pregnancy. Brian G. Skotko, *supra*, at 825.

As Judge Manion stated in dissent, "Nobody would dispute that Indiana has a compelling interest in protecting mixed-race children, women, and disabled individuals from discrimination. That the developing human lives Indiana seeks to protect are pre-born shouldn't change that." App. 31a. Yet "[p]ermitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others." App. 32a–33a (Manion, J., dissenting).

As genetic testing becomes more widely available and selective terminations of fetuses with disability diagnoses become more common, individuals already living with these same disabilities will no doubt receive the demeaning and stigmatizing message that they are not valued as productive members of society with equal human dignity. Recently, a man with Down syndrome testified on this issue before the House Subcommittee on Labor, Health, and Human

Services, saying that "the people pushing that particular 'final solution' are saying that people like me should not exist." *Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases Hearing Before Subcomm. on Labor, Health and Human Servs., and Educ. of the H. Comm. on Appropriations*, 163rd Cong. (2017) (statement of Frank Stephens, Quincy Jones Advocate, Global Down Syndrome Foundation, Board Member, Special Olympics Virginia), *available at* https://bit.ly/2QKIpLg.

Even some who support broad abortion rights have recognized the problem of using widely available genetic testing to abort babies with undesirable characteristics. One article noted the potential conflict between abortion rights and disability rights, acknowledging that "[i]t's also easy to be firmly pro-choice, and also unsettled by the termination numbers and the language of eradication." *See* Ruth Graham, *Choosing Life with Down Syndrome*, Slate, May 31, 2018, https://bit.ly/2A7n3Ct. Another author argued that while abortion should remain legal for any reason, disability-selective abortions are not "any different from leaving deformed children to the wolves[.]" Tim J. McGuire, *Aborting Fetuses with Down Syndrome Should Be Legal. But It's Still Wrong.*, The Washington Post, Mar. 30, 2018, https://wapo.st/2yH5zLl.

Sex-selective abortions, too, are becoming a greater concern. In the United States, the male-to-female birth ratio has climbed sharply in the last twenty years for some demographic groups. Kelsey

Harkness, *Sex Selection Abortions Are Rife in the U.S.*, Newsweek, Apr. 14, 2016, https://bit.ly/21Q0AfK. And in the UK, a recent investigation found thousands of British women in an online forum discussing how to use genetic testing to abort a fetus of the "wrong" sex. Amber Haque, *Labour Calls for Ban on Early Foetus Sex Test*, BBC News, Sept. 17, 2018, https://bbc.in/2QMHgD7.

HEA 1337 responds to these growing concerns and advances the interests in protecting human life articulated in *Roe* and *Casey* by protecting children with Down syndrome and other disfavored characteristics from invidious discrimination.

This concern is resonating across the country. As Judge Manion pointed out, "[o]ther states have followed Indiana's lead, so this particular issue is not going away." App. 31a n.4. Eight additional States currently have sex-selective abortion bans on the books. *See* Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. Arizona's law also bans abortions on the basis of race. *See* Ariz. Rev. Stat. Ann. § 13-3603.02. Three States ban abortions on the basis on genetic abnormality. *See* La. Rev. Stat. Ann. § 40:1061.1.2; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10. Ohio's Down syndrome abortion ban is currently pending at the Sixth Circuit. *See Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir. filed Apr. 12, 2018).

Laws banning discriminatory abortion proliferate as the genetic-testing technology that necessitates them becomes cheaper and more widely available. That same dynamic heightens the urgency of Supreme Court review now rather than later. If the Court demurs, perhaps to wait years and years for a circuit conflict that may never come, then long before the Court takes up the matter the Nation may go the way of many European countries, where fewer and fewer babies with Down syndrome make it to term each year. In Iceland, the abortion rate for Down syndrome babies approaches 100%, with only one or two born each year—and those few only because, as an Icelandic prenatal physician observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, Aug. 16, 2017, https://ind.pn/2OnbGis. Reportedly, the abortion rate for Down syndrome babies is 98% in Denmark, 90% in the UK, and 77% in France. George Will, *The Real Down Syndrome 'Problem'*, National Review, Mar. 15, 2018, https://bit.ly/2tRXnZm.

The Court should act now, so that States willing to stop such eugenic manipulation will know whether they have leeway to do so.

B. The non-discrimination provision does not interfere with the right protected by *Roe* and *Casey*

The decision below held that the non-discrimination provision violates *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as

a pre-viability prohibition on the decision of women who wish to have discriminatory abortions to make the ultimate decision whether to terminate their pregnancies. The panel majority and Chief Judge Wood's concurrence to the court's denial of rehearing *en banc* share this view. *See* App. 10a–11a ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional."); App. 116a ("The state has not asked for rehearing *en banc* of the panel's ruling on the Sex Selective and Disability Abortion Ban . . . and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.").

But the Court has not defined the abortion right that broadly. In *Casey*, the Court upheld what it considered to be the central premise of *Roe*: the woman's right, before viability, to make the choice whether or not to have a child. 505 U.S. at 871. Critically, it spoke of the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Id.* at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). In other words, "th[e] dimension of personal liberty that *Roe* sought to protect" was a woman's ability to choose to have an abortion "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant." *Id.* at 853.

Thus, the right protected by *Roe* and *Casey* is dualistic: a woman may choose, free of governmental coercion, to bear, or not to bear, a child. Courts have, therefore, invalidated laws targeting that *binary* choice prior to fetal viability. *See, e.g.*, *MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (statute prohibiting abortion where the fetus has a detectable heartbeat); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (statute prohibiting abortions of fetuses of at least 20 weeks gestational age, regardless of fetal viability); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (statute prohibiting abortions after 12 weeks of gestation if a heartbeat has been detected); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) (statute prohibiting non-emergency abortions of fetus of at least 20 weeks of gestational age); *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996) (statute limiting abortions after 20 weeks gestational age); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371–74 (9th Cir. 1992) (statute prohibiting non-emergency abortions).

But until this case no court has ever extended *Roe* and *Casey* to the decision of a woman otherwise willing to bear a child to terminate her pregnancy because she finds a *particular* child unacceptable—*i.e.*, to the decision of *which* child to bear. *See* App. 122a (Easterbrook, J., dissenting). Indeed, *Roe* specifically disavows "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." 410 U.S. at 153 (emphasis added). Ac-

cordingly, it was entirely reasonable for Judge Easterbrook to point out that "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a (Easterbrook, J., dissenting). More particularly, Judge Easterbook observed, "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a.

To the contrary, in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007), the Court already permitted a ban on one particular "type of abortion" that "implicates additional ethical and moral concerns that justify a special prohibition." Whereas *Gonzales* approved banning a particular *method* of abortion, Indiana's anti-discrimination law bans particular *reasons* for abortion. Indiana's anti-eugenics law does not attempt to replace viability with some other temporal re-definition of the right not "to bear or beget a child." Instead, it bans abortion based on ancillary overriding justifications not considered in *Roe* or *Casey*, just like the ban on partial-birth abortion upheld in *Gonzales*. To put it another way—in Judge Manion's words—Indiana "has a compelling interest in prohibiting [abortions] performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability. And it is hard to imagine legislation more narrowly tailored to promote this interest." App. 35a.

The non-discrimination provision is a qualitatively new type of abortion regulation, one that neither implicates the concerns underlying *Roe* and *Casey* nor

burdens the right those cases ultimately protect. It regulates women who have *already* made the decision "to bear or beget a child," but simply do not want to bear a *particular* child. Only this Court can correct the lower court's misperception that *Roe* and *Casey* bar this law. Accordingly, the Court should grant certiorari and uphold Indiana's authority to put an end to eugenic abortions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: October 12, 2018

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-00763-TWP-DML
Tanya Walton Pratt, *Judge.*

ARGUED FEBRUARY 15, 2018
DECIDED APRIL 19, 2018

Before BAUER, FLAUM, and MANION, *Circuit Judges.*

BAUER, *Circuit Judge.* On March 24, 2016, the Governor of Indiana signed into law House Enrolled Act No. 1337 (HEA 1337), which created new provisions and amended others that regulate abortion procedures within Indiana. Shortly thereafter, Planned

Parenthood of Indiana and Kentucky ("PPINK") filed a lawsuit against the Commissioner of the Indiana State Department of Health, the prosecutors of Marion, Lake, Monroe and Tippecanoe Counties, and members of the Medical Licensing Board of Indiana (collectively, "the State"). PPINK sought declaratory and injunctive relief from three particular parts of the law: (1) the new provisions titled "Sex Selective and Disability Abortion Ban," Ind. Code § 16-34-4 (2016), which prohibit a person from performing an abortion if the person knows the woman is seeking an abortion solely for one of the enumerated reasons (collectively, "the nondiscrimination provisions"); (2) an added provision to the informed consent process, instructing those performing abortions to inform women of the non-discrimination provisions, § 16-34-2-1.1(a)(1)(K); and (3) numerous amendments to the provisions dealing with the disposal of aborted fetuses, §§ 16-34-3-4(a); 16-41-16-4(d); 16-41-16-5; 16-41-16-7.6 (collectively, "the fetal disposition provisions").

The district court initially entered a preliminary injunction on June 30, 2016, and both parties subsequently filed motions for summary judgment. The court granted PPINK's motion for summary judgment on September 22, 2017, declaring the three parts of HEA 1337 unconstitutional and permanently enjoining the State from enforcing them.

We affirm. The non-discrimination provisions clearly violate well-established Supreme Court precedent holding that a woman may termi ate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any

reason. Because the non-discrimination provisions are unconstitutional, so too is the provision that a woman be informed of them. Additionally, the amended fetal disposition provisions violate substantive due process because they have no rational relationship to a legitimate state interest.

I. BACKGROUND

PPINK provides reproductive health services and education to thousands of women throughout Indiana and Kentucky. At its Bloomington, Indianapolis and Merrillville centers, PPINK performs surgical abortions through the first trimester of pregnancy (approximately 14 weeks). At these three centers, as well as the Lafayette center, PPINK also performs non-surgical, or medication, abortions.

A. The Non-Discrimination and Informed Consent Provisions

HEA 1337 creates Indiana Code chapter 16-34-4, entitled "Sex Selective and Disability Abortion Ban." The various provisions of this chapter prohibit abortions at any time, including prior to viability, if the abortion is sought for a particular purpose. Specifically, the non-discrimination provisions state that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," Ind. Code §§ 16-34-4-4, 16-34-4-5; (2) "solely

because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome," or has been diagnosed or has a potential diagnosis of "any other disability," §§ 16-34-4-6, 16-34-4-7; or (3) "solely because of the race, color, national origin, or ancestry of the fetus." § 16-34-4-8. The term "potential diagnosis" means "the presence of some risk factors that indicate that a health problem may occur," § 16-34-4-3, and "any other disability" is defined as "any disease, defect, or disorder that is genetically inherited," including both physical and mental disabilities. § 16-34-4-1.

Under Indiana law, it is a felony to knowingly and intentionally perform an abortion that is prohibited by law. See § 16- 34-2-7(a).Moreover, a person who knowingly and intentionally provides an unlawful abortion is subject to (1) "disciplinary sanctions," and (2) "civil liability for wrongful death." § 16-34- 4-9(a).

Indiana law requires that certain information be provided to a woman at least 18 hours prior to the abortion as part of the voluntary and informed consent process. See § 16-34-2-1.1(a). HEA 1337 adds a new provision requiring the abortion provider to inform a woman "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." § 16-34-2-1.1(a)(1)(K).

According to the State, the non-discrimination provisions were prompted by the medical advances of non-invasive genetic testing which allow for the de-

tection of disabilities at an early stage in the pregnancy. In particular, cell-free DNA testing, which screens for several genetic disabilities such as Down syndrome, can occur as early as 10 weeks into the pregnancy. PPINK does not provide genetic testing, but is aware that it performs abortions for women solely because of the diagnosis or potential diagnosis of Down syndrome and other disabilities. PPINK and the State agree that the rate of women seeking an abortion due to the diagnosis or potential diagnosis of a genetic disability will likely increase as these tests become more widespread.

B. The Fetal Disposition Provisions

HEA 1337 also changes the manner in which abortion providers must dispose of aborted fetuses. HEA 1337 did not alter the provision of the Indiana Code that gives a woman "the right to determine the final disposition of the aborted fetus." § 16-34-3-2(a). Prior to the enactment of HEA 1337, if a woman decided to let the abortion facility dispose of the fetus, Indiana regulations state that the facility must either bury or cremate the fetus. See 410 Ind. Admin. Code § 35-2-1(a). Those regulations specify that cremation means "incineration by a crematory, or incineration as authorized for infectious and pathological waste" under Indiana law. 410 Ind. Admin. Code § 35-1-3. Infectious waste includes pathological waste, Ind. Code § 16-41-16-4(b)(1), and pathological waste is defined as "(1) tissue; (2) organs; (3) body parts; and (4) blood or body fluids in liquid or semiliquid form; that are removed during surgery, biopsy, or autopsy." § 16-41-16-5.

Thus, prior to the enactment of HEA 1337, a woman might decide to dispose of the aborted fetus herself; or the facility that provided the abortion might dispose of the fetus through incineration along with other surgical byproducts. PPINK has utilized a contractor who periodically incinerates aborted fetuses along with other surgical byproducts.

HEA 1337 alters the manner in which an abortion provider must dispose of an aborted fetus if the woman elects not to dispose of it herself. Specifically, the new law states that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transmit permit requirements of [Indiana Code] 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." § 16-34-3-4(a). A "burial transmit permit" is a "permit for the transportation and disposition of a dead human body" as required under Indiana law. § 23-14-31-5. The amended provisions also state that "[a]borted fetuses may be cremated by simultaneous cremation." § 16-34-3-4(a).

Moreover, HEA 1337 changed the definitions of both infectious and pathological waste, stating that these terms "do[] not include an aborted fetus or a miscarried fetus." §§ 16- 41-16-4(d), 16-41-16-5. Thus, abortion providers like PPINK will no longer be able to contract with third parties to incinerate aborted fetuses with other surgical byproducts. Rather, the law will require PPINK to bury, cremate, or entombed the

aborted fetuses, although the fetuses maybe cremated simultaneously.

C. Procedural History

On April 7, 2016, two weeks after the Indiana Governor signed HEA 1337, PPINK filed a complaint in the Southern District of Indiana seeking declaratory and injunctive relief from the non-discrimination and fetal disposition provisions, which it alleged were unconstitutional. HEA 1337 was to go into effect on July 1, 2016. After extensive briefing and oral argument, the district court determined on June 30, 2016, that PPINK was likely to succeed on the merits, and granted a preliminary injunction barring the State from implementing and enforcing these provisions.

Both PPINK and the State moved for summary judgment. On September 22, 2017, the district court granted PPINK's motion for summary judgment and entered a permanent injunction declaring the non-discrimination and fetal disposition provisions unconstitutional. *Planned Parenthood of Ind. & Kent., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017). The court found that the non-discrimination provisions clearly violate Supreme Court precedent that a woman has the right to terminate her pregnancy prior to viability without undue interference from the State. *Id.* at 865–69. Having found those provisions unconstitutional, the court also held that the informed consent provision on the nondiscrimination provisions was unconstitutional. *Id.* at 869. Finally, the court held that although the

fetal disposition provisions do not implicate a fundamental right, they violate substantive due process because they lack a rational relationship to a legitimate governmental interest. *Id.* at 869–72.

II. DISCUSSION

We review a grant of summary judgment de novo, construing all factual disputes and reasonable inferences in favor of the non-moving party. *Golla v. Office of Chief Judge of Cook Cty., Ill.*, 875 F.3d 404, 407 (7th Cir. 2017). The moving party is entitled to summary judgment as a matter of law if they have shown there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a).

A. The Non-Discrimination Provisions Violate a Woman's Fourteenth Amendment Right to Terminate Her Pregnancy Prior to Viability

Forty-five years ago, the Supreme Court recognized that the right to privacy, as rooted in the Due Process Clause of the Fourteenth Amendment's concept of liberty, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 153 (1973). The Court in Roe recognized that "this right is not unqualified," and that it must be balanced "against important state interests in regulation." *Id.* at 154. *Roe* developed a rigid trimester framework by which to balance the competing interests. *Id.* at 164–65.

Although the Supreme Court abandoned the trimester framework when it revisited Roe's holding nearly twenty years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it reaffirmed what it labeled as *Roe's* "essential holding:"

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

505 U.S. 833, 846 (1992) (plurality opinion).

The Court in *Casey* drew the line between a woman's privacy right and the State's interest in protecting the potential life of a fetus at viability. *Id.* at 870. Importantly, *Casey's* holding that a woman has

the right to terminate her pregnancy prior to viability is categorical: "a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy *before viability*." Id. at 879 (emphasis added). Since *Casey*, this unambiguous holding has continued to be recognized as controlling precedent by the Supreme Court and this Court. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 987 (7th Cir. 2012).

Casey, like *Roe*, also noted that this right was not absolute. *Casey*, 505 U.S. at 875–76. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Id.* at 876. Accordingly, Casey introduced the undue burden standard: a state regulation creates an undue burden on a women's right to terminate her pregnancy if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The Court in Casey elaborated that these sort of regulations prior to viability "must be calculated to *inform* the women's free choice, *not hinder it*." *Id.* (emphasis added). Thus, while the State may enact measures to inform a woman's choice to terminate her pregnancy, the State may not prohibit the woman from making "the ultimate decision." *Id.* at 878–79.

The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and

are therefore, unconstitutional. The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State. *Id.* at 879 ("a State *may not prohibit* any woman from making the ultimate decision to terminate her pregnancy before viability.") (emphasis added). We are bound to follow that Supreme Court precedent. See *Karlin v. Foust*, 188 F.3d 446, 495 (7th Cir. 1999). Unsurprisingly, other circuits who have dealt with prohibitions prior to viability have had no trouble striking them down. See, e.g., *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (statute prohibiting pre-viable abortions where the fetus has a detectable heartbeat); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (statute prohibiting pre-viable abortions where fetus is at least 20 weeks gestational age); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (statute prohibiting pre-viable abortions after twelve weeks where the fetus has a detectable heartbeat).

The State knows we cannot overturn Supreme Court precedent; rather, it argues that the non-discrimination provisions are reconcilable with this precedent. The State creatively suggests that *Casey* only reaffirmed a woman's "binary choice" of whether or not to have a child prior to viability. *See Casey*, 505 U.S. at 851 ("Our cases recognize 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision

whether to bear or beget a child.'") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). In other words, according to the State, *Casey* only recognized a privacy right in the binary decision of whether to bear or beget a child, but that right is not extended to the decision to terminate a particular child.

Neither *Casey*, nor any other case, supports this "binary choice" theory. Under this theory, a woman may terminate her pregnancy if she decides *before* becoming pregnant that she does not want to bear a child at all, but she has no right to terminate the pregnancy if she determines *after* becoming pregnant that she does not want a particular child. Nothing in *Roe*, *Casey*, or any other case from the Supreme Court can be read to limit a woman's right in this way. Moreover, no court, let alone the Supreme Court, has recognized such a limitation. Rather, *Casey* held that the State may not prohibit a woman from making the "ultimate decision" to terminate her pregnancy prior to viability, and the State's power, prior to viability, is limited to informing the woman's choice. *Id.* at 877–79.

Moreover, such a "binary choice" theory runs contrary to the fact that a woman's right to terminate her pregnancy prior to viability is rooted in the Fourteenth Amendment's right to privacy. It is entirely inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if a woman decides before she becomes pregnant that she does not want to bear a child, but that the State can eliminate this privacy right if a woman later decides she wants to terminate her pregnancy for a particular purpose.

Nothing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability.

The State urges that the non-discrimination provisions represent a "qualitatively new type of abortion regulation," and that it has compelling interests in prohibiting discrimination of particular fetuses in light of technological advances in genetic screening. Indeed, as we have noted, the State "has legitimate interests from the outset of the pregnancy in protecting the health of the woman and life of the fetus that may become a child." *Id.* at 846. But the Supreme Court has already weighed the State's interests against a woman's privacy right to terminate her pregnancy prior to viability: "*Before viability, the State's interests are not strong enough to support a prohibition of abortion* or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* (emphasis added).[1] We cannot re-

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[1] Wisconsin and other states, as amici curiae, maintain that *Casey* only addressed the state interests "*actually urged* before the Supreme Court, such as the State's general interest in unborn life and the health of the mother." They thus contend that "[i]t is wrong to understand the Supreme Court's language as holding that pre-viability abortion is such an absolute right that every conceivable state interest must always yield to that right." This argument is not persuasive because it ignores that Court's rationale for providing the right to an abortion prior to viability in the first place; the woman's right to privacy protected by the liberty interest guaranteed by the Fourteenth Amendment. In short, the Court's decision to draw the line at viability was more

weigh a woman's privacy right against the State's interest. The Supreme Court has been clear: the State may inform a woman's decision before viability, but it cannot prohibit it.

The State concedes that if we conclude the non-discrimination provisions are unconstitutional, the provision requiring abortion providers to inform women of the non-discrimination provisions is also unconstitutional. Since we conclude that the non-discrimination provisions found in the "Sex Selective and Disability Abortion Ban," Ind. Code § 16-34-4, violate a woman's Fourteenth Amendment right to privacy, § 16-34-2- 1.1(a)(1)(K) of the informed consent provisions is unconstitutional, as well.

B. The Fetal Disposition Provisions Violate Substantive Due Process

PPINK contends that the fetal disposition provisions violate both substantive due process and equal protection principles. Since we conclude that the fetal disposition provisions violate due process, we need not address whether the provisions suffer from any equal protection problems.

PPINK agrees that no fundamental right is at stake. When a fundamental right is not implicated, substantive due process only "prohibits arbitrary deprivations of liberty by the government." *Hayden*

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about the woman's liberty interest than the State's competing interest.

ex rel. A.H. v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 576 (7th Cir. 2014). Accordingly, we apply rational basis review, meaning the fetal disposition provisions must "be rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). It is incumbent upon PPINK to demonstrate that the provisions violate substantive due process, and PPINK carries a high burden: "So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Hayden*, 743 F.3d at 576.

The fetal disposition provisions essentially require abortion providers to dispose of aborted fetuses in the same manner as human remains, as required under Indiana law. According to the State, the provisions further the State's legitimate interest in "the humane and dignified disposal of human remains." Such a position inherently requires a recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs. Indeed, in its brief, Indiana maintained that it "validly exercised its police power by making a moral and scientific judgment *that a fetus is a human being* who should be given a dignified and respectful burial and cremation." (emphasis added).

However, the Supreme Court has concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe*, 410 U.S. at 158. In reaching this conclusion, the Court in *Roe*

noted that "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159. While this question may continue to be disputed among those respective disciplines, it is not disputed in the law. *See Coe v. Cty. of Cook*, 162 F.3d 491, 495 (7th Cir. 1998) ("[T]he courts have decided that a fetus is not a person within the meaning of these clauses.").

Simply put, the law does not recognize that an aborted fetus is a person. "This conclusion follows inevitably from the decision to grant women a right to abort. If even a [non-viable] fetus is a person, surely the state would be allowed to protect [the fetus] from being killed." *Id.* As such, the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate.

The State asks us to infer a legitimate interest by pointing to state and federal fetal homicide statutes, as well as state wrongful death statutes that treat non-viable fetuses as human beings. But these statutes seek to address a valid state interest in promoting respect for potential life. The fetal disposition provisions differ because there is no potential life at stake. The State also argues that the Supreme Court in *Gonzales v. Carhart* recognized the State's interest in fetal human dignity. 550 U.S. at 163 (noting "the State's interest in promoting respect for human life at all stages of the pregnancy"). However, *Gonzales*

involved a "ban on abortions that involve partial delivery of a living fetus." *Id.* at 158 (emphasis added). *Gonzales* did not extend the State's interest beyond protecting potential fetal life that was reaffirmed in *Casey*. *Id.* ("[T]he State, from the inception of pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child.").

The State also relies on an Eighth Circuit decision upholding, on vagueness and substantive due process challenges, a Minnesota fetal disposition statute, which provided that fetuses of a certain age be disposed of "by cremation, interment by burial, or in a manner directed by the commissioner of health." *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 n.2 (8th Cir. 1990). As that court noted, the Supreme Court has recognized that the State has a legitimate interest "in regulating the disposal of fetal remains." *Id.* at 481; see also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983), *overruled on other grounds by Casey*, 505 U.S. at 881–85 (noting that a state or municipality has a "legitimate interest in proper disposal of fetal remains").

First, in *Planned Parenthood of Minnesota*, "Planned Parenthood concede[d] the state ha[d] a legitimate interest in protecting public sensibilities." 910 F.2d at 488. Therefore, the Eighth Circuit's discussion about the nature of the state interest was mere dicta. Second, the State's interest here in the humane and dignified disposal of an aborted fetus is meaningfully different. The Minnesota statute's stated purpose was "to protect the public health and

welfare by providing for the dignified and sanitary disposition of the remains of aborted or miscarried fetuses in a uniform manner." *Id.* at 481 n.2. The Eighth Circuit reiterated that the "Minnesota's legislature's overriding concern was protection of the public's sensibilities by ensuring that fetal remains be disposed of in a specified manner." *Id.* at 488. Thus, while Minnesota focused on the interest of the *public*, Indiana focuses on the interest of the *fetus*. Indeed, the State's interest here goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations prior to HEA 1337. Instead, the humane and dignified disposal of aborted fetuses requires recognizing that the fetus is legally equivalent to a human. Since the law does not recognize the fetus as a person, that is simply not a legitimate interest.

Even if we were to conclude that the State's interest is legitimate, it is not rationally related to that interest for two reasons. First, the fetal disposition provisions did not amend Indiana law that gives a woman "the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2(a). Thus, a woman may take possession of the aborted fetus and dispose of it in whatever manner she wishes, without restriction. No such provision under Indiana law allows for people to dispose of human remains in whatever manner they wish. Rather, Indiana law is exhaustive in its requirements for the disposition of human remains. *See* § 16-37-3-1, *et. seq.* (regulating disposition of dead bodies); § 23-14-54-1, *et seq.* (setting forth the disposition of dead human bodies at

crematories); § 25-15-2-7 (defining disposition of human remains as interment at cemetery or mausoleum; disposal of cremated remains on property, public land, or water; or burial at sea, among other definitions).

Second, the fetal disposition provisions also allow for simultaneous cremation of aborted fetuses. § 16-34-3-4(a). Indiana law only permits simultaneous cremation of human remains if there is prior written consent by authorizing agents. § 23-14-31-39(a). By allowing simultaneous cremation, the fetal disposition provisions do not treat aborted fetuses the same as human remains. In fact, PPINK essentially employs simultaneous cremation under the current law; HEA 1337 would simply prevent PPINK from using third parties for mass cremation with other surgical byproducts.

Thus, we cannot identify a rational relationship between the State's interest in "the humane and dignified disposal of human remains" and the law as written, given that it allows a woman full liberty to dispose of the fetus without restriction, and continues to allow for mass cremation of fetuses. Accordingly, the fetal disposition provisions violate substantive due process and are also unconstitutional.

III. CONCLUSION

Because we conclude that the non-discrimination provisions and the fetal disposition provisions are unconstitutional, we AFFIRM the district court's grant of summary judgment in favor of PPINK, and the

court's permanent injunction barring the enforcement of these provisions.

MANION, *Circuit Judge*, concurring in the judgment in part and dissenting in part. To put it mildly, this is an unfortunate case. Yet I must agree with the court that Supreme Court precedent compels us to invalidate Indiana's attempt to protect unborn children[1] from being aborted solely because of their race, sex, or disability. That a narrowly drawn statute meant to protect especially vulnerable unborn children cannot survive scrutiny under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), is regrettable. But the fact remains that under the *Casey* regime, the purported right to have a pre-viability abortion is more ironclad even than the rights enumerated in the Bill of Rights. Only a majority of the Supreme Court or a constitutional amendment can permit the States to place some limits on abortion.

The court then goes further than *Casey* requires, distinguishing an Eighth Circuit case and invalidating Indiana's requirement that abortion clinics bury or cremate fetal remains. I cannot agree. This is but the latest example of the legal misdirection that occurs in abortion cases. See *Hill v. Colorado*, 530 U.S.

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[1] The term "unborn child" is disfavored by some pro-choice advocates, but it is also used in Supreme Court opinions. See *Gonzales v. Carhart*, 550 U.S. 124, 134 (2007) ("Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development."). I use it throughout this dissent to refer to the living fetus developing during the course of a pregnancy.

703, 741–42 (2000) (Scalia, J., dissenting). Under traditional rational basis review, if state action doesn't infringe upon a fundamental right or affect a protected class, we will uphold it so long as it is rationally related to a legitimate state interest. The fetal remains provision easily satisfies that extremely deferential standard. That part of Indiana's law rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn.

For the reasons that follow, I concur only in the court's judgment invalidating the nondiscrimination and disclosure provisions. I dissent from the portion of the judgment invalidating the fetal remains provision.

I. The Nondiscrimination Provisions

House Enrolled Act 1337 prohibits the performance of an abortion when the doctor knows that the woman seeks an abortion solely because of the race, sex, or disability of the unborn child. The provisions apply at any point in the pregnancy, so they directly implicate the right devised in *Casey* and *Roe v. Wade*, 410 U.S. 173 (1973). *Casey's* controlling joint opinion held that any regulation on abortion is invalid if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion). The nondiscrimination provisions have both the purpose *and* effect of *prohibiting* some women—those who want sex-, race-, or disability-selective abortions—from obtaining an abortion. Thus, they

erect a substantial obstacle for those women. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) ("the relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.'" (quoting *Casey*, 505 U.S. at 895)).

Indiana and the *amici* States persuasively argue that the right identified in *Roe* and *Casey* is only the right to decide *whether* to have a child, not the right to decide *which* child to have. This argument makes sense. After all, the women for whom the nondiscrimination provisions present an obstacle have already determined that they want a child. The nondiscrimination provisions simply prohibit those women from targeting their unborn child because of later-discovered immutable human characteristics. Indiana and the *amici* States have made a noble effort to defend a statute that should need no defense. But the fact remains that *Casey* has plainly established an absolute right to have an abortion before viability. The joint opinion says that *nothing* can stand between a woman and her choice of abortion before viability. See, e.g., *Casey*, 505 U.S. at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."); *id.* at 874 ("[T]he right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."); *id.* at 877 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."). While States may legislate to encourage informed consent or ma-

ternal health, legislation that does *too well* at convincing women to choose life has been held invalid. See *id.* at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

As an intermediate appellate court, we are bound to follow *Casey*, and so I must agree with the court that the nondiscrimination provisions are invalid. Yet this case reveals two major flaws of the *Casey* analysis that combine to produce such an absurd result—absurd even relative to other abortion cases. First, *Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights. And second, while *Casey* jettisoned *Roe's* strict-scrutiny test for all first-trimester abortion regulation, it replaced strict scrutiny with an effects-based test that is actually *more difficult* to satisfy in many cases.

Further, if we applied strict scrutiny in this case, Indiana could prevail. The nondiscrimination provisions are narrowly tailored to target invidious discrimination against people whom nobody would deny would be members of protected classes were they allowed to be born. Surely, Indiana has a compelling interest in attempting to prevent this type of private eugenics. And the prohibitions would not affect the vast majority of women who choose to have an abortion without respect to the race, sex, or disability of the unborn child.

A. Abortion is a "Super-Right" Immune Even to Strict Scrutiny

Ranking member of the Senate Judiciary Committee Dianne Feinstein has often referred to *Roe* as "super-precedent."[2] Of course, there's no such thing as "super-precedent"—any case may be overruled by five Supreme Court Justices. But while *Roe* isn't super-precedent, it did spawn a body of jurisprudence that has made abortion the only true "super-right" protected by the federal courts today. The purported right to an abortion before viability is the *only* one that may not be infringed even for the very best reason. For an unenumerated right judicially created just 45 years ago, that is astounding.

The typical tiers-of-scrutiny analysis courts conduct in constitutional cases is a means-ends analysis. See *United States v. Williams*, 616 F.3d 685, 691 (7th Cir. 2010) (If a claim falls within the scope of the Second Amendment, courts "apply some level of 'means-ends' scrutiny to establish whether the regulation passes constitutional muster."). Strict scrutiny requires both a compelling end and a tight fit between means and ends; the government must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v.*

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[2] For further criticism of "super-precedent," see David French's commentary in *National Review* on Senator Feinstein's questioning of then Judge Neil Gorsuch at his Supreme Court confirmation hearing. David French, *No, Senator Feinstein*, Roe v. Wade *is Not a 'Superprecedent'*, National Review, Mar. 21, 2017, https://www.nationalreview.com/2017/03/dianne-feinstein-roe-v-wade-neil-gorsuch-superprecedent-lie/.

Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (quoting *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721, 734 (2011)). That's a hard standard to meet, but the Supreme Court has in recent years held that restrictions on fundamental rights like freedom of speech and the right to be free from racial discrimination satisfied strict scrutiny. See, e.g., *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (upholding Florida judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (upholding racially discriminatory college admissions program on the ground that it is narrowly tailored to satisfy the university's interest in attaining diverse student body). This isn't surprising in its own right. After all, "even the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). But when contrasted against the absolute nature of the putative right to pre-viability abortion, we see that abortion is now a more untouchable right than even the freedom of speech.

The doctrinal reason for this is that *Casey's* "undue burden" standard is not a means-ends test, but a pure effects test. The key quote from the *Casey* joint opinion reveals this: a regulation of abortion is invalid if it "has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (emphasis added). This means that even a regulation narrowly tailored to serve a compelling state interest is invalid if it prohibits any abortions before viability.

After all, a prohibition is not just a substantial obstacle, but a complete obstacle. As one commentator supportive of abortion rights explained, "undue burden wholly lacks such a nexus inquiry: under *Casey*, courts must analyze a statute's purpose and its effects, but need not assess the relationship between the two." Emma Freeman, Note, *Giving* Casey *its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 Harv. C.R.-C.L. L. Rev. 279, 279–80 (2013).

The "purpose or effect" formulation will inevitably bar every attempt to limit the incidence of abortion, even those that don't prohibit particular abortions. As Justice Scalia correctly observed, *Casey* permits Indiana to try to persuade women to choose life "only so long as it is not too successful." *Casey*, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).[3] Since courts cannot consider

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[3] Justice Scalia's quote brings to mind another issue that looms over most abortion cases. Planned Parenthood and other supporters of abortion rights say that they are "pro-choice." Yet they often challenge legislation simply intended to inform a woman's choice. For example, the plaintiff in this case also obtained a preliminary injunction prohibiting Indiana from enforcing its requirement that a woman view an ultrasound at least 18 hours before an abortion is performed unless she elects in writing not to do so. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 273 F. Supp. 3d 2013 (S.D. Ind. 2017), appeal filed No. 17-1883 (7th Cir.). Planned Parenthood knows that the ultrasound is an "invaluable tool in revealing the personhood of unborn children." National Institute of Family and Life Advocates, *A Comprehensive Medical Conversion Program*, https://nifla.org/life-choice-project-tlc/ (last visited

the weight of the State's interest in a particular case, all that matters is how effective the statute will be at limiting abortion. If we applied this standard to other constitutional claims, no plaintiff would ever lose. After all, state action prohibiting a plaintiff's speech would certainly erect a "substantial obstacle" to that speech, and state action prohibiting particular people from possessing firearms would be a "substantial obstacle" to the exercise of those individuals' Second Amendment rights. But that's not how it works. Instead, States may even prohibit political speech. See *Williams-Yulee*, 135 S. Ct. at 1682–83 (Kennedy, J., dissenting) ("The individual speech here is political speech. The process is a fair election. These realms ought to be the last place, not the first, for the Court

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April 6, 2018). That's why it denigrates pro-life pregnancy centers that seek to show ultrasounds to women considering abortion. See Brief for Planned Parenthood Affiliates of California, et al., in *Nat'l Inst. of Family & Life Advocates v. Becerra* at 29–30, No. 16-1140 (Sup. Ct. 2018).

Indeed, Planned Parenthood and its allies have gone as far as to support California's effort to force pro-life pregnancy centers to advertise for abortion. See *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016), cert. granted sub nom. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017). One need not wonder what Planned Parenthood's reaction would be if a State were to require its clinics to advertise for free ultrasounds and counselors at pro-life pregnancy centers. If Planned Parenthood were really pro-choice (and not just pro-abortion), it would encourage a client who had initially been happy to be pregnant to seek counseling elsewhere when she discovered that her unborn child had Down syndrome or another disability. Such counseling with an informed advocate for the living fetus would benefit both the woman and her unborn child.

to allow unprecedented content-based restrictions on speech."). And the federal government can withdraw Second Amendment rights from significant groups of people based on prior conduct. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (upholding the constitutionality of 18 U.S.C. § 922(g)(9), which prohibits those convicted of misdemeanor domestic violence from possessing firearms). While these fundamental rights are subject to significant limitations under heightened scrutiny, the purported right to an abortion before viability is absolute because of *Casey's* purpose or effect test.

That today's outcome is compelled begs for the Supreme Court to reconsider *Roe* and *Casey*. But assuming the Court is not prepared to overrule those cases, it is at least time to downgrade abortion to the same status as actual constitutional rights. The Court can start by permitting the States to assert their legitimate interests in defense of abortion laws. Since *Casey* disavowed universal application of strict scrutiny in abortion cases, the question remains how to determine the proper means-ends test to apply. Fortunately, one already exists that would give courts flexibility to adjust the level of scrutiny based on the severity of the "burden" on the putative abortion right: the *Anderson-Burdick* sliding scale the Court uses to evaluate election regulations.

Anderson-Burdick is a sliding scale of means-ends scrutiny. *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011). If an election law imposes a severe burden on speech and association rights, it must satisfy strict scrutiny. *Burdick v.*

Takushi, 504 U.S. 428, 434 (1992) (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But if the law is "reasonable" and "nondiscriminatory," then rational basis review is proper and "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); see also *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008) (plurality opinion) ("However slight that burden may appear ... it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" (quoting *Norman*, 502 U.S. at 288–89)). In this context, *Anderson-Burdick* would require a plaintiff challenging a restrictive abortion law to make a threshold showing that the regulation was a "severe" burden on the right. If the plaintiff could manage that, then the State would have to satisfy strict scrutiny. If not, then courts would uphold [the regulation] so long as it was rationally related to a legitimate government interest.

Replacing *Casey's* "purpose or effect" test with *Anderson-Burdick's* sliding scale (or any other means-ends test) would at least give Indiana a chance to defend its ban on discriminatory abortions. As it is, the State loses before it can even say a word. That disparate treatment of abortion cases is not only unfair, but lacks any basis in text, structure, or tradition. It is an aberration that should be corrected. I continue to agree with the dissenting justices in *Roe* and *Casey*. But if we are stuck with those landmark decisions, the abortion rights those cases created should at least be on a level playing field with the rest of the Constitution. The *Casey* abortion-specific test should

be replaced with traditional means-ends scrutiny. This would go a long way towards normalizing the federal courts' abortion jurisprudence.

B. Indiana Might Prevail Under Strict Scrutiny

If the Court were to agree to apply strict scrutiny to the nondiscrimination provisions, what would happen? Admittedly, this is a difficult question, because *Casey* has not permitted means-ends scrutiny of abortion laws for decades. Indiana appears to be the first State that has attempted to protect particular unborn children from abortion based on their human characteristics.[4] Nevertheless, the analysis should not be all that difficult. Nobody would dispute that Indiana has a compelling interest in protecting mixed-race children, women, and disabled individuals from discrimination. That the developing human lives Indiana seeks to protect are preborn shouldn't change that.

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[4] Other states have followed Indiana's lead, so this particular issue is not going away. An Ohio district court recently granted a preliminary injunction prohibiting enforcement of a similar Ohio law. *Preterm-Cleveland v. Himes*, No. 1:18-cv-109, _ F. Supp. 3d _, 2018 WL 1315019 (S.D. Ohio Mar. 14, 2018). And the Utah House of Representatives recently passed a similar bill by a 54-17 vote this past February. Ben Lockhart, *Committee Likely to Prevent Senate Hearing on Bill Barring Down Syndrome Abortions, Sponsor Says*, Deseret News, Mar. 7, 2018, https://www.deseretnews.com/article/900012362/committee-likely-to-prevent-senate-hearing-on-bill-barring-down-syndrome-abortions-sponsor-says.html.

Race, sex, and disability-selective abortions are obviously all problematic,[5] but I will focus here on the particular problem of abortion due to a diagnosis of Down syndrome.[6] Permitting women who otherwise

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[5] Opposing sex-selective abortions, for instance, used to be uncontroversial. As recently as 2007, the Ethics Committee of the American College of Obstetricians and Gynecologists "oppose[d] meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices." American College of Obstetricians and Gynecologists Committee on Ethics, *Sex Selection*, No. 360, p. 3 (Feb. 2007), available at https://www.nzord.org.nz/news/news-and-press-releases?a=4239. The Committee "share[d] the concern expressed by the United Nations and the International Federation of Gynecology and Obstetrics that sex selection can be motivated by and reinforce the devaluation of women." *Id.* at 2. Research backs up this position, particularly noting the disastrous effects of widespread sex-selective abortion in Asia. See Hesketh, Lu, & Xing, *The Consequences of Son Preference and Sex-Selective Abortion in China and other Asian Countries*, 183 Canadian Med. Ass'n. J. 1374 (2011). Yet Planned Parenthood, which claims to be a women's rights organization, has still challenged a State ban on sex-selective abortion.

[6] Indiana's law and this litigation have provoked a public debate about abortion of unborn children with Down syndrome. Nationally syndicated columnists Marc Thiessen and George Will have weighed in strongly opposing the practice. Marc A. Thiessen, *When Will We Stop Killing Humans with Down Syndrome*, Wash. Post, Mar. 8, 2018, https://www.washingtonpost.com/opinions/when-will-we-stop-killinghumans-with-down-syndrome/2018/03/08/244c9eba-2306-11e8-badd7c9f29a55815_story.html?utm_term=.57852865480a; George F. Will, *The Real Down Syndrome Problem: Accepting Genocide*, Wash. Post, Mar. 14, 2018, https://www.washingtonpost.com/opinions/whats-the-real-down-syndrome-problem-the-genocide/2018/03/14/3c4f8ab8-26ee-11e8-

want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others and increases the "stigma associated with having a genetic disorder." Peter A. Benn & Audrey R. Chapman, *Practical and Ethical Considerations of Noninvasive Prenatal Diagnosis*, 301 J. Am. Med. Ass'n 2154, 2155 (2009). Weren't we done with that when society repudiated the disgraceful language in *Buck v. Bell*, 274 U.S. 200, 207 (1927), that "[t]hree generations of imbeciles are enough"? Yet some countries are now celebrating the "eradication" of Down syndrome through abortion. Alexandra DeSanctis, *Iceland Eradicates People with Down Syndrome*, National Review, Aug. 16, 2017, https://www.nationalreview.com/2017/08/down-syndrome-iceland-cbs-news-disturbing-report/. That not only devalues the lives of those living with Down syndrome, but it dis-incentivizes research that might help them in the future.

What is more, studies show that people with Down syndrome *and their parents and siblings* are quite happy and lead fulfilling lives. A 2011 Harvard study found that "[a]mong those surveyed, nearly 99% of people with DS indicated that they were happy with their lives, 97% liked who they are, and 96% liked how they look. Nearly 99% of people with DS expressed love for their families, and 97% liked

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b79df3d931db7f68_story.html?utm_term=.2ed16d15c40b. Ruth Marcus of the Washington Post has defended it. Ruth Marcus, *I Would've Aborted a Fetus with Down Syndrome. Women Need That Right*, Wash. Post, Mar. 9, 2018, https://www.washingtonpost.com/opinions/i-wouldve-aborted-a-fetus with-down-syndrome-women-need-that-right/2018/03/09/3aaac364- 23d6-11e8-94da-ebf9d112159c_story.html?utm_term=.8bcb5841a660.

their brothers and sisters." Skotko, Levine, & Goldstein, *Self-Perceptions From People With Down Syndrome*, 2011 Am. J. Med. Genetics 2360, 2360, 2364. In the same year, Boston Children's Hospital found that 99 percent of parents or guardians of Down syndrome children loved their child and 79 percent "felt their outlook on life was more positive because of their child." Boston Children's Hospital, *Parents Siblings and People With Down Syndrome Report Positive Experiences*, available at http://www.childrenshospital.org/news-andevents/2011/september-2011/parents-sibilings-and-peoplewith-down-syndrome-report-positive-experiences. (last visited April 19, 2018). Ninety-four percent of siblings 12 and older reported that they were proud of their Down syndrome brother or sister, and 88 percent said that they were better people because of their sibling. *Id.* Children with Down syndrome bring joy to everyone around them. And despite their limitations, they can go on to achieve great things. People like Karen Gaffney, who leads a non-profit foundation dedicated to advocating for those with Down syndrome, prove that point all the time. Gaffney has swam across Boston Harbor, completed a relay across the English Channel, and competed in the Escape from Alcatraz triathlon in the course of her advocacy. Down Syndrome International, *Karen Gaffney Braves the Elements to Complete Boston Harbour Swim*, https://dsint.org/news/karen-gaffney-braves-elements-complete-boston-harbour-swim-down-syndrome-international-13.(last visited April 19, 2018).[7]

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[7] To be clear, Indiana's compelling interest in prohibiting abortions sought because of the unborn child's disability stems

Even though Indiana cannot stop all abortions, it has a compelling interest in prohibiting those performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability. And it is hard to imagine legislation more narrowly tailored to promote this interest than the nondiscrimination provisions. The challenged sections only prohibit abortions performed *solely* because of the race, sex, or disability of the unborn child. The doctor also must know that the woman has sought the abortion solely for that purpose. These are provisions that apply only to very specific situations and carefully avoid targeting the purported general right to pre-viability abortion. They will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, they will not even affect women who consider the protected characteristics along with other considerations. If it is at all possible to narrowly tailor abortion regulations, Indiana has done so.[8]

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primarily from the intrinsic value and dignity of all humans, before and after birth, regardless of their utilitarian worth. But the statistics show that, contrary to the belief of some, a diagnosis of Down syndrome is not a sentence to a life of misery. Instead, those with Down syndrome lead fulfilling lives and bring joy to everyone around them.

[8] For comparison, the similar Ohio statute struck down in *Preterm Cleveland* (referenced in footnote 4) is not as narrowly tailored as Indiana's law. The Ohio law prohibits the performance an abortion if the doctor "has knowledge that the pregnant woman is seeking the abortion, *in whole or in part*, because of" a fetal diagnosis of Down syndrome. Ohio Rev. Code § 2919.10(B) (emphasis added). Because the Ohio statute prohibits abortions performed due *in part* to a diagnosis of Down syndrome, it prohibits more abortions than the law challenged here.

Because the nondiscrimination provisions are narrowly tailored to further a compelling state interest, they seem likely to satisfy strict scrutiny. This case thus highlights the problem with *Casey*'s "purpose or effect" test. While *Casey* purported to reject prior cases that gave short shrift to the State's interest in protecting unborn life, its abandonment of means-ends scrutiny can produce absurd results. One of those is that Indiana has lost the ability to defend its abortion restrictions, even under "the most demanding level of judicial review." *Smith v. Shalala*, 5 F.3d 235, 238 (7th Cir. 1993).

I would prefer to sustain the nondiscrimination provisions. Because I have no choice but to follow Supreme Court precedent, I reluctantly concur in the court's judgment invalidating them.[9]

II. The Fetal Remains Provision

The court also invalidates Indiana's requirement that abortion clinics bury or cremate the remains of the unborn child if the woman chooses to leave the remains with the clinic. I cannot agree.

The parties and the court agree that the fetal remains provision is subject only to rational basis re-

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[9] As the court explains, the disclosure provision falls with the nondiscrimination provisions. If the nondiscrimination provisions are invalid, it follows that Indiana cannot require physicians to tell women that Indiana law prohibits abortions performed because of the race, sex, or disability of the unborn child. Therefore, I also join the court's judgment invalidating this provision.

view. "Legislation in question is presumed to be rational." *Peterson v. Lindner*, 765 F.2d 698, 705 (7th Cir. 1985). That is, the mere fact that this legislation passed both Houses of the Indiana General Assembly and was signed by the Governor endows it with a presumption of rationality.[10] Indeed, it is hard to overstate how deferential our review is in rational basis cases under the Equal Protection and Due Process Clauses. In an equal protection case, we've said that "the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006). And in a due process case, we've emphasized that review is "highly deferential" to the point where government action "must be 'utterly lacking in rational justification.'" *Brown v. City of Michigan City*, 462 F.3d 720, 733 (7th Cir. 2006) (quoting *Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000)). "Under rational basis review, the plaintiff almost invariably loses." Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 889 (2012).

The court errs in several respects. First, it draws a distinction from the Eighth Circuit, which has upheld a substantially similar Minnesota law. Then, the court adopts Planned Parenthood's red herring argument that Indiana cannot require fetal remains

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[10] House Enrolled Act 1337 easily passed both Houses of the General Assembly. After amendments, the Senate voted 37-13 in favor and the House concurred in the Senate amendments by a vote of 60-40. Indiana General Assembly, 2016 Session, Actions for House Bill 1337, https://iga.in.gov/legislative/2016/bills/house/1337#document-51b52d50 (last visited April 9, 2018).

be disposed with dignity because unborn children are not persons under the Fourteenth Amendment. And finally, the court departs from traditional rational basis review and requires far too close a fit between means and ends. Combined, these errors produce a result that would never happen in any context but abortion.

A. Distinction from the Eighth Circuit

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 451–52 (1983)—a decision overruled by *Casey* because it *undervalued* the State's interest in unborn life—the Supreme Court invalidated on vagueness grounds an Akron ordinance that required doctors performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." But while the Court held that the ordinance failed to give doctors fair notice of what conduct would be criminalized, it was careful to explain that its decision wouldn't prevent Akron from enacting another ordinance with more definite terms. Indeed, the Court recognized in a footnote that States have a "legitimate interest in the proper disposal of fetal remains." *Id.* at 452. The problem with the ordinance wasn't that Akron could never regulate the disposition of fetal remains, but that its ordinance was not specific enough. *Akron* at least hinted that States may require that abortion doctors respect the dignity of the unborn child when disposing of her remains. What other interest could the Court have meant by the "*proper* disposal of fetal remains"? (emphasis added).

The Eighth Circuit then confronted a more definite statute in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The challenged Minnesota law required that fetal remains be disposed of "by cremation, interment by burial, or in a manner directed by the commissioner of health." Minn. Stat. § 145.1621(4). The court held the law was not vague because it specifically described the ways in which remains must be disposed. *Planned Parenthood*, 910 F.2d at 482–83. Having avoided the *Akron* problem, the court went on to conclude that the requirement was rationally related to Minnesota's legitimate interest in protecting "public sensibilities." *Id.* at 488.

This case is very similar to the Eighth Circuit's decision. The Indiana Administrative Code provision here says that each abortion clinic "shall provide for the disposition of an aborted fetus by any of the following methods: (1) In the earth in an established cemetery pursuant to Ind. Code § 23-14-34. (2) Cremation." 410 Ind. Admin. Code § 35-2-1(a). And similar to the Minnesota law, Indiana's law does not apply to women who choose to take the remains of their unborn children home rather than leave them at the clinic. See *Planned Parenthood*, 910 F.2d at 488 (holding that "given the privacy concerns implicit in activity in one's home," the State could regulate clinics and not individual women disposing remains at home); Ind. Code § 16-34-3-2(a) ("A pregnant woman who has an abortion under this article has the right to determine the final disposition of the aborted fetus."). The Indiana and Minnesota laws are substantially similar in every material respect.

The court tries to distinguish *Planned Parenthood of Minnesota*, noting that the Eighth Circuit said the overriding purpose of the Minnesota law was "protection of the public's sensibilities by ensuring that fetal remains be disposed of in a specified manner." *Planned Parenthood*, 910 F.2d at 488. Indiana's law, the court says, "goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations prior to HEA 1337." Maj. Op. at 15–16. But, while the Eighth Circuit termed Minnesota's interest "protecting public sensibilities," in reality the same state interest is involved in both cases; the dignified and humane disposal of the remains of unborn children. Why else would both laws dictate two methods of disposal typical for humans, but not typical for medical waste? Whether you call it "public sensibilities," "morality," or "human dignity," the state interest is the same. That interest is sufficient to justify the fetal remains provision.[11]

B. Fourteenth Amendment Personhood

That leads me to the next point. The court says it cannot accept Indiana's purported interests in dignified and humane disposition of fetal remains because that would "require[] recognizing that the fetus is le-

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[11] Indeed, an argument can be made that circulation under Circuit Rule 40(e) is appropriate here because the panel's decision creates a circuit split. See *United States v. Sinclair*, 770 F.3d 1148, 1158 n.2 (7th Cir. 2014). The panel avoids this problem by distinguishing *Planned Parenthood of Minnesota* from this case.

gally equivalent to a human." Maj. Op. at 16. According to the court, because unborn children are not recognized as persons under the Fourteenth Amendment, Indiana may not require they be treated as such. But this is a red herring. The Supreme Court's judgment that the Fourteenth Amendment does not protect the unborn certainly means that the States cannot interfere with the purported right to abortion. It also means that Indiana isn't *required* to treat fetal remains the same as other human remains, as it might be if the unborn had legal personhood. But it doesn't follow that the States can't—within the confines of *Roe* and *Casey*—recognize the dignity and humanity of the unborn. Indeed, a supermajority of the States already do just that by enforcing fetal homicide laws, the constitutionality of which has never been doubted. See Brief of Wisconsin, et al., as Amicus Curiae at 16; *Coleman v. DeWitt*, 282 F.3d 908, 912–13 (6th Cir. 2002) (rejecting a manslaughter defendant's argument that Ohio's fetal homicide statute was unconstitutional as applied to unborn children before viability).

Fetal homicide laws are different, the court says, because they "seek to address a valid state interest in promoting respect for potential life." Maj. Op. at 14. That misses the point. The court argues that States cannot treat unborn children as persons, but fetal homicide statutes, as well as wrongful death statutes treating non-viable fetuses as human beings, do just that. Even the term "fetal homicide" presumes that the unborn child is a person, at least for the purposes of those statutes, as "homicide" is "[t]he killing of one person by another." Black's Law Dictionary 802 (9th ed. 2009). It makes no sense to say that States may

value the dignity of an unborn child in some instances, but not if the pregnant woman wants to abort her. Simply put, the fact that the unborn are not persons under the Fourteenth Amendment does not prohibit States from recognizing their inherent dignity and humanity.

C. Fit between Means and Ends

Not content with devaluing the importance of Indiana's interests, the court proceeds to require far too tight a fit between those interests and the disposition requirements. The court says that Indiana isn't *really* treating aborted children as human beings because it still permits women to take fetal remains home from the abortion clinic and still allows for simultaneous cremation. So while the court's initial objection was that Indiana treats unborn children as too human, it then objects that the provision is irrational because it doesn't treat unborn children as human enough. That is not how rational basis review works.

The court's objections amount to claims that the fetal remains provision is underinclusive. But even where a law is "simultaneously overinclusive and underinclusive" it still may "easily" withstand rational basis review "because 'perfection is by no means required' and [a] 'provision does not offend the Constitution simply because the classification is not made with mathematical nicety.'" *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 656 (7th Cir. 2013) (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). "[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). The In-

diana General Assembly might rationally have decided that "given the privacy concerns implicit in activity in one's home," it did not want to regulate the conduct of women in their own homes. *Planned Parenthood*, 910 F.2d at 488. It could have also rationally concluded that it would be too costly to require individual cremation, or even that the law wouldn't have passed with such a requirement. These line-drawing questions are quintessentially legislative. Simply put, "the Constitution does not require [Indiana] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). The General Assembly acted rationally, so we lack the power to disturb its judgment.

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Like the Eighth Circuit, I would conclude that Indiana's fetal remains provision is rationally related to the State's interest in protecting public sensibilities. I would add that Indiana has a significant interest in recognizing the dignity and humanity of the unborn child. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals." *Tagami v. City of Chicago*, 875 F.3d 375, 379 (7th Cir. 2017) (quoting *Barnes v. Glen Theatre*, 501 U.S. 560, 568–69 (1991)). The People of Indiana have spoken. If we must permit abortion, they say, the victims of that procedure should at least be entitled to be treated better than medical waste. That judgment is not irrational.

I would reverse the judgment of the district court with respect to the fetal remains provision and remand with instructions to enter judgment for the State.

III. Conclusion

Indiana made a noble attempt to protect the most vulnerable members of an already vulnerable group. That it must fail is not due to lack of effort either by the legislators who drafted it or the Solicitor General who ably argued before us. The Supreme Court's abortion jurisprudence proved an insurmountable obstacle despite their best efforts. More than anything, this case illustrates the extent to which abortion has become the most favored right in American law. Without a significant recalibration, the States sadly cannot protect even unborn children targeted because of their race, sex, or a diagnosis of Down syndrome. But this court is powerless to change that state of affairs. Only the Supreme Court or a constitutional amendment can do that.

Until that time comes, there may be a workable standard that would preserve the putative general right to pre-viability abortion while permitting the States to prohibit certain abortions provided the prohibitions are narrowly drawn to further a compelling state interest. Prohibiting the targeting of particular unborn children who were originally welcomed but later targeted based on their immutable characteristics would meet that standard. If States cannot at least do this, abortion will remain the most sacred constitutional right. Still, even with the high wall that *Roe* and *Casey* have erected, it may be possible

to ensure that States can place some meaningful limits on abortion. Scrapping *Casey*'s "purpose or effect" test in favor of traditional means-ends scrutiny would be a good place to start.

As it is, I am compelled to concur in the court's judgment invalidating the nondiscrimination provisions and the disclosure provision. With respect to the fetal remains provision, however, I am not so constrained. I would hold that it is a legitimate exercise of Indiana's police power. Therefore, I respectfully dissent from that portion of the court's opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH *et al.*,	)	
Defendants.	)	

FINAL JUDGMENT PURSUANT TO FED R. CIV. PRO. 58

The Court having on September 22, 2017, made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

Judgment is entered in favor of Plaintiffs Planned Parenthood of Indiana and Kentucky, Inc. and Carol Dellinger, M.D., against Defendants in their official capacities.

It is **DECLARED** that the following provisions of House Enrolled Act 1337 violate the United States Constitution, and the State of Indiana, its agents and agencies, and all political subdivisions thereof are **ENJOINED** from enforcing them;

- The anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8;
- The information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K); and
- As applied to pre-viability abortions and miscarriages only, all of the fetal tissue disposition provisions, including Indiana Code §§ 16-21-11-6; 16-34-3-4(a), 16-41-16-1, 16-41-16-4(d), 16-41-16-5 and 16-41-16-7.6.

Judgment is entered accordingly, and this action is **TERMINATED**.

Date: 10/11/2017

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: Deputy Clerk, U. S. District Court

To: All ECF-registered counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., and CAROL DELLINGER, M.D.,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH in his official capacity, PROSECUTORS OF MARION, LAKE, MONROE, AND TIPPECANOE COUNTIES in their official capacities, and THE INDIVIDUAL MEMBERS OF THE MEDICAL LICENSING BOARD OF INDIANA in their official capacities,	)	
Defendants.	)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs Planned Parenthood of Indiana and Kentucky and Carol Dellinger, M.D. (collectively, "PPINK"), (Filing No.

73), and Defendants the Commissioner of the Indiana State Department of Health ("ISDH"), the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and members of the Medical Licensing Board of Indiana (collectively, "the State"), all in their official capacities, (Filing No. 75).

On March 24, 2016, House Enrolled Act No. 1337 ("HEA 1337"), which creates new regulations of abortion and practices related to abortion, was signed into law. PPINK maintains that several provisions of HEA 1337 are unconstitutional. PPINK seeks to permanently enjoin the implementation and enforcement of these provisions, and a declaratory judgment that the challenged provisions are unconstitutional. For the reasons that follow, the Court concludes that the challenged provisions violate the Fourteenth Amendment to the United States Constitution and permanently enjoins enforcement of these provisions.

I. BACKGROUND

PPINK is a non-profit healthcare provider which offers reproductive healthcare, family planning, and preventive primary-care services. (Filing No. 30-1 at 1.) At the outset of this case, it operated twenty-three health centers in Indiana and two in Kentucky. (Filing No. 30-1 at 1.) Three of the Indiana health centers, located in Bloomington, Merrillville, and Indianapolis, provide surgical abortion services to patients. (Filing No. 30-1 at 1.) Surgical abortions are available at these centers only through the first trimester of pregnancy. (Filing No. 30-1 at 1.)

On March 24, 2016, the Governor of Indiana signed into law HEA 1337, which would have become

effective on July 1, 2016. *See* Ind. Code §16-34-4-1 *et seq.* HEA 1337 creates several new provisions and amends several others regarding Indiana's regulation of abortion and practices related to abortions. *See id.* Three aspects of HEA 1337 are challenged by PPINK in this action. The parties essentially do not dispute the key background facts related to the challenged provisions, nor do they dispute the potential consequences of these provisions for PPINK and its patients. The Court will therefore only briefly set forth the challenged provisions and summarize the background evidence related to each provision.

A. Anti-Discrimination and Information Dissemination Provisions

HEA 1337 creates Indiana Code § 16-34-4, and is entitled "Sex Selective and Disability Abortion Ban." This chapter bans abortions sought solely for certain enumerated reasons. Specifically, HEA 1337 provides that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," §§ 16-34-4-4, 16-34-4-5; (2) "solely because the fetus has been diagnosed with, or has a potential diagnosis of, Down syndrome or any other disability," §§ 16-34-4-6, 16-34-4-7; or (3) "solely because of the race, color, national origin, or ancestry of the fetus," § 16-34-4-8. The phrase "potential diagnosis" is defined as "the presence of some risk factors that indicate that a health problem may occur." Ind.

Code § 16-34-4-3. Moreover, HEA 1337 requires abortion providers to complete a form provided by ISDH that indicates, among other things, the "gender of the fetus, if detectable," and "[w]hether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability." Ind. Code § 16-34-2-5(a)(6).

Indiana law sets forth consequences for abortion providers who violate these provisions. Currently, it is a felony to knowingly or intentionally perform an abortion that is not permitted by Indiana law, and HEA 1337 does not change this. *See* Ind. Code § 16-34-2-7(a). Moreover, HEA 1337 provides that "[a] person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to: (1) disciplinary sanctions under IC 25-1-9; and (2) civil liability for wrongful death." Ind. Code § 16-34-4-9(a).

Not only does HEA 1337 preclude abortions sought solely for one of the enumerated reasons, but the associated information dissemination provision requires abortion providers to inform their patients of the anti-discrimination provisions. Specifically, abortion providers must inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K).

The State presents evidence that these provisions were passed in light of technological developments that allow the diagnosis or potential diagnosis of fetal disabilities to be made early in a pregnancy. In particular, cell-free fetal DNA testing is able to screen for

several genetic abnormalities, including Down syndrome, as early as ten weeks into the pregnancy. (Filing No. 54-1 at 5.) Tests such as the cell-free fetal DNA test are screening tests rather than diagnostic tests, and as such, only reveal the likelihood of genetic abnormality. (Filing No. 54-1 at 4.)

The parties are essentially in agreement that a significant number of women have sought, and will continue to seek, an abortion solely because of the diagnosis of a disability or the risk thereof. (See, e.g., Filing No. 30-1 at 2-3 (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Moreover, the parties agree that the number of women who will seek an abortion at least in part out of these concerns will likely increase as testing is more widely available than ever before.

B. Fetal Tissue Disposition Provisions

HEA 1337 also changes the manner in which fetal tissue must be disposed. Under current Indiana law, prior to the passage of HEA 1337, "[a] pregnant woman who has an abortion ... has the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2. If the woman decides to let the facility performing the abortion dispose of the fetal tissue, Indiana regulations require that the facility bury or cremate the fetal tissue. *See* 410 I.A.C. § 35-2-1(a). Currently, if a medical facility elects to cremate fetal

tissue, it must do so by using a "crematory" or by "incineration as authorized for infectious and pathological waste." 410 I.A.C. § 35-1-3. Pathological waste includes tissues, organs, body parts, and blood or bodily fluid "that are removed during surgery, biopsy, or autopsy." Ind. Code § 16-41-16-5. Infectious waste includes pathological waste, Ind. Code § 16-41-6-4(b), and it can be destroyed through various procedures including incineration, Ind. Code § 16-41-6-3(b). Therefore, as it currently stands, the woman can determine to bury, cremate, or otherwise dispose of the fetal tissue herself, or the fetal tissue may be incinerated along with other human surgical byproducts such as organs. PPINK currently utilizes a contractor who periodically incinerates the fetal tissue along with other surgical by-products.

HEA 1337 alters the manner in which healthcare providers must handle fetal tissue in instances where the patient does not elect to retain it and dispose of it herself. It provides that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." Ind. Code § 16-34-3-4(a).[1] A "burial transit permit" is a "permit for the transportation and disposition of a dead human body required under IC 16-37-3-10 or IC 16-37-3-12." Ind. Code § 23-14-31-5.

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[1] PPINK notes in its Amended Complaint that the same disposition requirements apply to fetal tissue that results from a miscarriage when that tissue is removed by an abortion clinic. (Filing No. 54-10 at 2.)

Moreover, HEA 1337 excludes "an aborted fetus or a miscarried fetus" from the definition of "infectious waste." Ind. Code § 16-41-16-4(d). This means that if a healthcare provider elects to use cremation rather than interment, the cremation of the fetal tissue must be performed at a crematory. However, the cremation of fetal tissue need not each be performed separately; HEA 1337 explicitly provides that "[a]borted fetuses may be cremated by simultaneous cremation." Ind. Code § 16-34-3-4(a). In exploring compliance with these new provisions, PPINK has been informed by the ISDH that its plan to aggregate "the products of conception in a container suitable for cremation and then, periodically, [have] the container delivered to a crematorium for final disposition" will comply with the statute. (Filing No. 54-10 at 2.)

C. Procedural History

In the operative Second Amended Complaint, PPINK maintains that several provisions of HEA 1337 are unconstitutional, and it seeks to permanently enjoin the implementation and enforcement of these provisions. (Filing No. 83 at 11.) PPINK also seeks a declaratory judgment that HEA 1337 is unconstitutional to the extent that it:

> (a) Denies the ability of a woman to obtain an abortion during the first trimester of her pregnancy for the reasons noted in Ind. Code § 16-34-4-5 through Ind. Code § 16-34-4-8;

> (b) Requires as part of the "informed consent" process that women seeking abortions be informed that they are unable to obtain an abortion if their sole reason for doing so is because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having a disability; and
>
> (c) Requires fetal tissue after a first trimester abortion or a miscarriage to be treated by the abortion provider differently than other medical material.

(Filing No. 83 at 11). Following extensive briefing and oral argument, the Court granted PPINK's Motion for Preliminary Injunction, (Filing No. 7), concluding that PPINK was likely to succeed on the merits of its claims, (Filing No. 62).

PPINK and the State have cross-moved for summary judgment. (Filing No. 73; Filing No. 75.) Those motions are now fully briefed and ripe for the Court's review.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court reviews the record in the light most favorable to the nonmoving party and draws all reasonable inferences in that

party's favor. *Zerante*, 555 F.3d at 584; *Anderson*, 477 U.S. at 255.

The party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (noting that when the non-movant has the burden of proof on a substantive issue, specific forms of evidence are not required to negate a non-movant's claims in the movant's summary judgment motion, and that a court may grant such a motion, "so long as whatever is before the district court demonstrates that the standard...is satisfied"); *see also* Fed. R. Civ. P. 56(c)(1)(A) (noting additional forms of evidence used in support or defense of a summary judgment motion, including "depositions, documents electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials").

Thereafter, a nonmoving party who bears the burden of proof on a substantive issue may not rest on its pleadings, but must affirmatively demonstrate by specific factual allegations that there is a genuine issue of material fact that requires trial. *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007); *Celotex Corp.*, 477 U.S. at 323-24; Fed. R. Civ. P. 56(c)(1). Neither the mere existence of some alleged factual dispute between the parties nor the existence of some "metaphysical doubt" as to the material facts is sufficient to defeat a motion for summary judgment. *Chiaramonte v. Fashion Bed Grp., Inc.*, 129

F.3d 391, 395 (7th Cir.1997); *Anderson*, 477 U.S. at 247-48; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which [it] relies." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir.2008).

Similarly, a court is not permitted to conduct a paper trial on the merits of a claim and may not use summary judgment as a vehicle for resolving factual disputes. *Ritchie v. Glidden Co., ICI Paints World-Grp.*, 242 F.3d 713, 723 (7th Cir.2001); *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Indeed, a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir.2003) (highlighting that "these are jobs for a factfinder"); *Hemsworth*, 476 F.3d at 490. When ruling on a summary judgment motion, a court's responsibility is to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Id.*

III. DISCUSSION

The Court previously addressed all issues presented in this litigation in the Order preliminarily enjoining enforcement of the challenged sections of HEA 1337. (Filing No. 61.) Upon review of the parties' summary judgment briefing, a completely developed factual record, and the applicable legal authorities, the Court's view of the appropriate final determination of

these issues remains unchanged. Drawing substantially from the Court's prior Order, (Filing No. 61), significant portions of which are incorporated herein, the Court modifies and extends that analysis only to the extent necessitated by the parties' additional arguments.

A. Anti-Discrimination Provisions

PPINK contends that the anti-discrimination provisions clearly violate well-established Supreme Court precedent in that they prohibit women from obtaining an abortion prior to fetal viability. (Filing No. 74 at 2.) The State posits that HEA 1337 represents a "qualitatively new kind of [abortion] statute," and, as such, it argues that the Supreme Court precedents on which PPINK relies do not address, and therefore do not govern, the constitutionality of these provisions. (Filing No. 76 at 11.)

"It is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). This right is grounded in the right to privacy rooted in "the Fourteenth Amendment's concept of personal liberty." *Roe v. Wade*, 410 U.S. 113, 153 (1973); *see Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment"). This right was first articulated in *Roe* but has since been repeatedly reexamined by the Supreme Court. Despite the Supreme Court's frequent revisiting of the issue, certain core principles have essentially remained unchanged since *Casey*, where a plurality of

the Supreme Court reaffirmed *Roe*'s essential holding. *Casey*, 505 U.S. at 846. The essential holding of *Roe* has three parts:

> First is a recognition of the right of the woman to choose to terminate a pregnancy before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman" life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Casey, 505 U.S. at 846.[2]

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[2] Although a plurality of the justices articulated these principles in *Casey*, subsequent Supreme Court decisions have recognized and applied these principles when considering challenges to abortion laws. *See Gonzales v. Carhart*, 550 U.S. 124, 145-46 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 920, 120 (2000). In *Stenberg*, for example, a majority of the Supreme Court characterized these principles as "established" and applied them as such to Nebraska's partial birth abortion ban. 530 U.S. at 921. More recently, in *Gonzales*, the Supreme Court only "assume[d]" that these principles governed. 550 U.S. at 146. Nevertheless, federal courts have recognized that this assumption merely signaled that the Supreme Court may be open to reevaluating those

The anti-discrimination provisions of HEA 1337 clearly violate the first of these principles, in that they prevent women from obtaining abortions before fetal viability. The woman's right to choose to terminate a pregnancy pre-viability is categorical: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 870, 879 ("Before [viability] the woman has a right to choose to terminate her pregnancy."); *Stenberg*, 530 U.S. at 920 (same); *Gonzales*, 550 U.S. at 146 (same). As stated by the Seventh Circuit, "the constitutional right to obtain an abortion is a right against coercive governmental burdens; the government may not 'prohibit any woman from making the ultimate decision to terminate her pregnancy' before fetal viability." *Planned Parenthood of Ind.*, 699 F.3d at 987 (7th Cir. 2012) (quoting *Casey*, 505 U.S. at 874, 879).

Given the categorical nature of this principle, circuit courts have consistently held that any type of out-

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principles in the future, not that those principles no longer represented the governing law. *See, e.g., MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (acknowledging that in *Gonzales* the Supreme Court only "assume[d]" *Casey*'s principles governed, but reasoning that "[e]ven so, the [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decision."). Indeed, the Seventh Circuit has treated these principles as binding precedent. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 987 (7th Cir. 2012). Perhaps because of this, the parties do not dispute that the principles articulated in *Casey* and subsequently applied in *Stenberg* and *Gonzales* constitute binding precedent.

right ban on pre-viability abortions is unconstitutional. *See MKB Management Corp.*, 795 F.3d at 773 (holding that a state law was unconstitutional because "we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions" and the challenged law "generally prohibits abortions before viability"); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (holding that a state law was unconstitutional because its "broad[ ] effect ... is a categorical ban on *all* abortions between twenty weeks gestational age and viability," which "is directly contrary to the [Supreme] Court's central holding in *Casey* that a woman has the right to 'choose to terminate a pregnancy *before viability* and to obtain it without undue interference from the State' ") (quoting *Casey*, 505 U.S. at 846).

Nevertheless, the State attempts to accomplish via HEA 1337 precisely what the Supreme Court has held is impermissible. The anti-discrimination provisions prohibit a woman from choosing to terminate a pregnancy pre-viability if the abortion is sought solely for one of the enumerated reasons. For this Court to hold such a law constitutional would require it to recognize an exception where none have previously been recognized. Indeed, the State has not cited a single case where a court has recognized an exception to the Supreme Court's categorical rule that a woman can choose to terminate a pregnancy before viability. This is unsurprising given that it is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice. *See Casey*, 505 U.S. at 846 (stating that it is a woman's "*decision* to terminate her pregnancy"

that is protected by the Fourteenth Amendment) (emphasis added); *id.* at 879 ("A State may not prohibit any woman from *making the ultimate decision* to terminate her pregnancy before viability.") (emphasis added).

The State resists this conclusion on multiple bases. First, the State casts the anti-discrimination provisions as the next iteration of our society's prohibition on discrimination. The State points to technological advances allowing earlier and more accurate information regarding whether a fetus has a diagnosis or potential diagnosis of Down syndrome or other disabilities. These technological advances, says the State, have led in part to an increase in the number of abortions sought for reasons related to those disabilities. Because the Supreme Court has recognized that the State has a legitimate interest in protecting potential life even from the outset of a pregnancy, the State maintains that the anti-discrimination provisions simply further its interest in protecting the potential life from discrimination.

The State is correct that the Supreme Court has consistently recognized that "the State has legitimate interests from the outset of the pregnancy in protecting ... the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. But while this is true, the State simply ignores that the Supreme Court in *Casey* "struck a balance" between this interest and a woman's liberty interest in obtaining an abortion. *Gonzales*, 550 U.S. at 146. These interests weigh differently depending on whether the fetus is viable. Before viability, the Supreme Court made clear that "the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846, 869,

("[a]t a later point in fetal development,"—namely, viability—"the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

Therefore, although the State's interest in protecting and even promoting potential life is a legitimate one, the Supreme Court has already weighed this interest against a woman's liberty interest in choosing to terminate a pregnancy and concluded that, prior to viability, the woman's right trumps the State's interest. This is the "central holding" of *Roe*, and the State's position would require this Court to undermine that holding, which of course it cannot do. *See Stenehjem*, 795 F.3d at 772 ("[t]he [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases," and thus all federal courts "are bound by those decisions"). Accordingly, the State's focus on the technological developments since *Roe* and *Casey* are unpersuasive, and indeed irrelevant. This case is not about technological developments, but rather about a woman's liberty interest weighed against the State's interest in potential life. Developments in technology related to disability screening and the consequences that flow from those developments do not give this Court license to reevaluate the Supreme Court's judgment as to the balancing of these interests.

Second, the State advances a so-called "binary choice" interpretation of *Roe* and *Casey*, which, if accepted, would support the State's position that "HEA 1337 does not interfere with a right protected by *Roe* and *Casey*." (Filing No. 76 at 26.) The State's argument begins with the woman's liberty interest as articulated in *Casey*: "the right of the *individual* ... to be free from unwarranted governmental intrusion into

matters so fundamentally affecting a person as the decision whether *to bear or beget a child*." (Filing No. 76 at 26, citing *Casey*, 505 U.S. at 851 (emphasis added)). According to the State,

> both the woman's rights and the State's interests are different if the pregnant woman decides she wants a baby generally, but not the particular baby she happens to be carrying. A woman has already decided to bear a child. Although her privacy and liberty interests have not completely evaporated, those rights are not as central as they once were.

(Filing No. 76 at 26).

The difficulty with the State's position is that there is nothing in *Roe* or *Casey* that limits the right to terminate a pregnancy pre-viability to women who do not want to have a child *ever* as opposed to those who do not want to see a particular pregnancy through to birth. The quote from *Casey* on which the State relies certainly does not establish that a woman's right to decide whether to bear a child refers to the decision to have a child generally, rather than whether to continue a specific pregnancy. And the State does not cite a single legal authority that has recognized its binary choice theory or its proffered interpretation of *Roe* or *Casey*.

The lack of authority supporting the State's position likely stems from the fact that it is contrary to the core legal rights on which a woman's right to choose to terminate her pregnancy prior to viability are predicated. The Supreme Court has mandated that this right stems from a liberty right protected by

the Fourteenth Amendment—specifically, a woman's right to *privacy*. *See Roe*, 410 U.S. at 153. Such a right "includes the interest in independence in making certain kinds of important decisions," such as whether to terminate a pregnancy. *Casey*, 505 U.S. at 859 (citation and quotation marks omitted). PPINK's claim is based on an infringement of this privacy right—the woman's right to make the important, personal, and difficult decision of whether to terminate her pregnancy. As stated above, the Supreme Court has weighed this right against the State's interest in protecting potential life and determined that the woman's privacy right—although "not ... unlimited"—is strong enough pre-viability to preclude the State from preventing her "from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879.

Under the State's theory, a woman either wants to have a child or does not; and, once a woman chooses the former, she cannot then terminate her pregnancy for reasons, whatever they may be, that the State deems improper. But the very notion that, pre-viability, a State can examine the basis for a woman's choice to make this private, personal and difficult decision, if she at some point earlier decided she wants a child as a general matter, is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions. The State's theory is also contrary to the reality that the decision to terminate a pregnancy involves "intimate views with infinite variations." *Id.* at 853.

To summarize, nothing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman's right to choose an abortion prior to viability

can be restricted if exercised for a particular reason determined by the State. The right to a pre-viability abortion is categorical. Indeed, the Seventh Circuit has described "the mother's right to abort a fetus that has not yet become viable [as] essentially absolute." *Coe v. County of Cook*, 162 F.3d 491, 493 (7th Cir.1998). This is because, despite the State's legitimate interest in potential life during the entirety of the pregnancy, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846. The Supreme Court has already balanced the parties' interests and concluded that the State's pre-viability interests are simply not strong enough for it to lawfully prohibit pre-viability abortions. Yet HEA 1337 does just that.

Accordingly, the Court concludes that the anti-discrimination provisions of HEA 1337 are unconstitutional.

B. Information Dissemination Provision

HEA 1337 also requires abortion providers to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K). Simply put, this provision requires abortion providers to inform patients of the anti-discrimination provisions discussed above.

PPINK maintains that requiring abortion providers to disseminate and patients to listen to this information violates their First Amendment rights regarding compelled speech and compelled listening, respectively. As the parties point out, the Seventh Circuit has not yet determined what level of scrutiny applies to the type of professional speech at issue here. (Filing No. 74 at 19-20; Filing No. 76 at 29-30.) The Court need not determine, however, what level of scrutiny applies, because the parties agree that in the event that the Court holds the anti-discrimination provisions to be unconstitutional, the information dissemination provision is likewise unconstitutional. (Filing No. 74 at 20; Filing No. 76 at 30.)

Having concluded that the anti-discrimination provisions violate the Fourteenth Amendment, the Court likewise concludes that Ind. Code § 16-34-2-1.1(a)(1)(K) is unconstitutional.

C. Fetal Tissue Disposition Provisions

PPINK's final challenge is to the new fetal tissue disposition provisions created by HEA 1337. PPINK contends that these requirements violate substantive due process and equal protection principles.[3]

The parties agree that the fetal tissue disposition provisions do not implicate a fundamental right. When a fundamental right is not at stake, substantive due process still creates "a residual substantive limit

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[3] Because the Court concludes that the requirements violate substantive due process principles, it need to reach the equal protection issue.

on government action which prohibits arbitrary deprivations of liberty." *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). A law will survive such a challenge if the State can "demonstrate that the intrusion upon ... liberty is rationally related to a legitimate government interest." *Id.*; *Charleston v. Bd. of Trustees of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir.2013) ("Substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational."). It is ultimately the plaintiff's burden to demonstrate that the challenged law "lacks a rational relationship with a legitimate government interest; it is not the [government's] obligation to prove rationality with evidence." *Hayden*, 743 F.3d at 576. The plaintiff's burden is a "heavy one: So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Id.*

The State describes its interest as "treating fetal remains the same as other human remains," (Filing No. 76 at 30), or alternatively, "the humane disposal of fetal remains," (Filing No. 76 at 35). PPINK argues that this asserted interest is insufficient because the State has no legitimate interest in ensuring that abortion providers treat fetal tissue in the same manner as human remains. Specifically, PPINK maintains that the State's asserted interest would require this Court "to make a leap that the Supreme Court has refused to take. Namely, to decide that human life begins at conception and that a fetus is a human being." (Filing No. 74 at 21.)

The Court concludes that the State's asserted interest is not legitimate. As the Seventh Circuit has noted, the Supreme Court and the circuit courts applying Supreme Court precedent have unequivocally held that for purposes of the Fourteenth Amendment, a fetus is not a "person." *See Coe* 162 F.3d at 495 (citing *Roe*, 410 U.S. at 158; *Casey*, 505 U.S. at 912 [Stevens, J., concurring]; *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir.1997); *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir.1991)). As such, the Court can find no legal basis for the State to require health care providers to treat fetal remains in the same manner as human remains. Stated otherwise, if the law does not recognize a fetus as a person, there can be no legitimate state interest in requiring an entity to treat an aborted fetus *the same* as a deceased human.

The State points to other state and federal statutes as being "full of provisions that equate even a non-viable fetus with a human being," arguing that these statutes are analogous, and that the State's asserted interest is therefore legitimate. (Filing No. 76 at 30-33.) What those statutes do not share in common with the present law, however, is that they concern circumstances in which the State seeks to promote respect for potential life. No potential life is at issue in this provision. Absent a potential life, this Court would have to determine that fetal tissue is in some respects the equivalent of human remains for the State's interest to be legitimate. This would be quite similar to a recognition that a fetus is a person, an affirmation which this Court is not allowed to make. As explained by the Seventh Circuit, the con-

clusion in *Roe* that a fetus is not a person "follows inevitably from the decision to grant women a right to abort. If even a first-trimester fetus is a person, surely the state would be allowed to protect him from being killed ...." *Coe*, 162 F.3d at 495.

The State also argues that "respectful treatment of fetal remains also stems from cultural and religious traditions," and it cites to Hindu, Buddhist, and Christian practices that "treat deceased fetuses as persons." (Filing No. 76 at 34.) Aside from the obvious entanglement of church and state suggested by this argument, it also ignores the fact that the law as it existed prior to the passage of HEA 1337 allowed individuals ample leeway to vindicate their own relevant religious or cultural practices. A patient was permitted to take possession of the fetal tissue, whether the result of an abortion or a miscarriage, and dispose of it in whatever manner she chose, including in accordance with her particular religious or cultural beliefs.

Second, the State boldly contends that it is a "biological fact" that embryonic fetal tissue is a "human being." (Filing No. 76 at 30.) The Supreme Court, however, has not reached the same conclusion. Whether or not an individual views fetal tissue as essentially the same as human remains is each person's own personal and *moral* decision. *Cf. Roe*, 410 U.S. at 159 ("[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."); *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of

the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."). The Court cannot resolve this moral question. But as a legal question, there is currently no basis which would allow this Court to recognize fetal tissue as a human being, and therefore analogous to human remains.

Notably, courts that have upheld requirements regarding the disposition of fetal tissue have done so by recognizing a legitimate state interest in ensuring the sanitary disposal of fetal tissue.[4] *See, e.g., Leigh v. Olson*, 497 F.Supp. 1340, 1351 (D.N.D.1980) (recognizing that there is a legitimate state interest in regulating "the disposal of dead fetuses to protect the public health"). But the State does not attempt to justify the fetal tissue disposition provisions on this basis, likely because Indiana statutes already require that fetal tissue be disposed of in a sanitary manner.

In sum, the Court can find no legal support for the State's position that it has a legitimate interest in "treating fetal remains the same as other human remains." (Filing No. 76 at 35.) The Supreme Court has made clear that a fetus is not legally a person, but the State's asserted interests are essentially that fetal tis-

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[4] A fetal tissue disposition statute was upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990), but in that case the plaintiff "concede[d] the state has a legitimate interest in protecting public sensibilities." *Id.* at 488. Not only was no similar concession made here, but the State's asserted legitimate interest is meaningfully different in this case. For both of these reasons, the Eighth Circuit's decision is of no persuasive value here.

sue should be treated similarly to human remains because they are like human remains. Although the Supreme Court has recognized a legitimate governmental interest in promoting the life of a fetus during a pregnancy, such an interest is always tethered to the notion that the fetus represents a potential life and the State can legitimately promote respect for that potentiality. The Supreme Court has extended these principles no further than that, and the State has not provided a basis so that this Court can do otherwise. Therefore, any legitimate interest the State has in a potential life during a pregnancy is no longer present once the pre-viability pregnancy is terminated; and thus, it does not have a legitimate state interest in treating fetal tissue similarly to human remains.

Even if the Court were to conclude that the State had a legitimate interest in treating embryonic and fetal tissue "the same as other human remains," the disposition provision is not rationally related to that purpose, because in most respects, it does not treat fetal tissue in the same manner that it treats human remains. First, it allows patients to take possession of the fetal tissue and imposes no restrictions whatsoever on the manner in which they choose to dispose of that tissue. The same is not true of the disposition of human remains, which are subject to numerous requirements regarding burial and cremation. For example, state law enumerates the permitted dispositions of human bodies, including, *inter alia*, interment in an established cemetery, disposal of cremated human remains on the property of a consenting owner or an uninhabited public land, or burial at sea. Ind. Code § 25-15-2-7. State law also provides, with great

specificity, details regarding burial, such as the minimum depth at which human remains must be buried, and proper ventilation if remains are placed in a mausoleum. *See, e.g.*, Ind. Code §§ 34-14-54-2, 23-14-54-3. Second, the provision allows for the simultaneous cremation of fetal tissue from an unspecified number of patients. Simultaneous cremation is only permitted for human remains if consented to in writing by the authorizing agent(s). Ind. Code § 23-14-31-39(a).[5] The Court sees no rational relationship between the State's purported goal—treating fetal tissue like human remains—and the law as written, given that it permits both the release of fetal tissue to patients with no restrictions whatsoever, and the mass cremation of fetal tissue.

For the reasons above, the Court concludes that the challenged disposition provisions violate the Fourteenth Amendment to the U.S. Constitution.

IV. CONCLUSION

The United States Supreme Court has stated in categorical terms that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. It is clear and undisputed that unless *Roe v. Wade* and *Planned*

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[5] As PPINK highlights, it was already disposing of fetal tissue by utilizing professional, regulated removal companies to collect and incinerate it. (Filing No. 74 at 22.) The two major changes instituted by HEA 1337 are that it requires PPINK to use crematories, rather than facilities that handle medical tissue, and that PPINK is required to take possession of the ashes after cremation (at which time, presumably, it may dispose of those in any manner permitted by statute). (Filing No. 74 at 22.)

Parenthood of Se. Pa. v. Casey are overturned by the United States Supreme Court, this Court is bound to follow that precedent under the rule of *stare decisis*. *See Casey*, 505 U.S. at 870 (stating that the doctrine of stare decisis requires reaffirmance of *Roe's* essential holding recognizing a woman's right to choose an abortion before fetal viability); *MKB Mgmt. Corp. v. Burdick*, 954 F.Supp.2d 900 (D.N.D.2013) ("[n]o judge in the United States can overrule *Roe v. Wade*; only the Supreme Court can do so"); *Sojourner v. Roemer*, 772 F.Supp. 930, 932 (E.D. La. 1991).

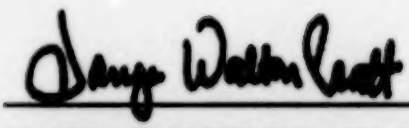
The challenged anti-discrimination provisions directly contravene well-established law that precludes a state from prohibiting a woman from electing to terminate a pregnancy prior to fetal viability. The information dissemination provision is also unconstitutional, as it requires abortion providers to convey false information regarding the anti-discrimination provisions to their patients. The fetal tissue disposition provisions do not further a legitimate state interest and are therefore also unconstitutional.

Accordingly, PPINK's Motion for Summary Judgment, (Filing No. 73), is **GRANTED**, and the State's Motion for Summary Judgment, (Filing No. 75), is **DENIED**.

The Court **ISSUES A PERMANENT INJUNCTION** prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions.

SO ORDERED.

Date: 9/22/2017



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., DR. MARSHALL LEVINE, M.D.,	)	Case No. 1:16-cv-00763-TWP-DML
Plaintiffs,	)	
v.	)	
COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH in his official capacity, *et al.*,	)	
Defendants.	)	

ENTRY GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65(a) by Plaintiffs Planned Parenthood of Indiana and Kentucky, Inc. and Dr. Marshall Levine (collectively "PPINK"). (Filing No. 7.) PPINK filed this suit against the Commissioner of the Indiana State Department of Health ("ISDH"), the prosecutors of Marion County, Lake County, Monroe County, and Tippecanoe County, and members of the Medical Licensing Board of Indiana (collectively "the State"), all in their official capacities.

On March 24, 2016, the Governor of Indiana signed into law House Enrolled Act No. 1337 ("HEA 1337"), which creates new regulations of abortion and practices related to abortion. PPINK maintains that several provisions of HEA 1337 are unconstitutional, and it seeks to enjoin the implementation and enforcement of these provisions during the pendency of this litigation and prior to July 1, 2016, the date on which the provisions take effect. PPINK seeks a preliminary injunction as to three aspects of HEA 1337: (1) the anti-discrimination provisions, which preclude abortions if sought solely for certain reasons enumerated in the statute such as the fetus's race, sex, or disability; (2) the information dissemination provision, which requires abortion providers to inform their patients of the anti-discrimination provisions and the types of abortions those provisions prohibit; and (3) the fetal tissue disposition provisions, which require fetal tissue to be disposed of in a manner similar to that of human remains.

The parties submitted evidence, and the Court held a hearing on PPINK's Motion. For the reasons that follow, PPINK is entitled to an injunction as to all of the challenged provisions. PPINK is likely to succeed on the merits of its challenge to the anti-discrimination provisions because they directly contravene the principle established in *Roe v. Wade*, 410 U.S. 113 (1973), that a state may not prohibit a woman from making the ultimate decision to have an abortion prior to fetal viability. Similarly, the information dissemination provision is likely unconstitutional as it requires abortion providers to convey almost certainly false information to their patients. In

addition, PPINK faces irreparable harm of a significantly greater magnitude if these provisions are not enjoined than that faced by the State from an injunction.

PPINK's challenges to the fetal tissue disposition provisions present a much closer call and present difficult legal questions about which there are few clear answers. In the end, however, the Court concludes that the State's asserted interest in treating fetal remains with the dignity of human remains is not legitimate given that the law does not recognize a fetus as a person. Therefore, PPINK has a strong likelihood of success on its substantive due process challenge to these provisions as well. Because the balance of harms also favors PPINK regarding this claim, PPINK has demonstrated that the Court should enjoin the fetal tissue disposition provisions pending resolution of this litigation.

Accordingly, PPINK's Motion for Preliminary Injunction is **GRANTED** (Filing No. 7).

I. LEGAL STANDARD

A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

> To obtain a preliminary injunction, a party must establish [1]that it is likely to succeed on the merits, [2] that it is likely to suffer irreparable harm in the absence of preliminary relief,

> [3] that the balance of equities tips in its favor, and [4] that issuing an injunction is in the public interest.

Grace Schools v. Burwell, 801 F.3d 788, 795 (7th Cir. 2015); *Winter*, 555 U.S. at 20. "The court weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (citation and internal quotation marks omitted). "Stated another way, the district court 'sit[s] as would a chancellor in equity' and weighs all the factors, 'seeking at all times to minimize the costs of being mistaken.'" *Id.* (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

II. BACKGROUND

PPINK is a non-profit healthcare provider which offers reproductive healthcare, family planning, and preventive primary-care services. It operates twenty-three health centers in Indiana and two in Kentucky. Three of the Indiana health centers, located in Bloomington, Merrillville, and Indianapolis, provide surgical abortion services to patients. Surgical abortions

are available at these centers only through the first trimester of pregnancy. Plaintiff Dr. Levine is one of the physicians who provides surgical abortions for PPINK.

The Indiana legislature recently passed HEA 1337, which becomes effective on July 1, 2016. HEA 1337 creates several new provisions and amends several others regarding Indiana's regulations of abortion and practices related to abortions. Three aspects of HEA 1337 are challenged by PPINK in this action. The parties essentially do not dispute the key background facts related to the challenged provisions, nor do they dispute the potential consequences of these provisions for PPINK and its patients. The Court will therefore briefly set forth the challenged provisions and summarize the background evidence related to each provision.

A. Anti-Discrimination and Information Dissemination Provisions

HEA 1337 creates Indiana Code § 16-34-4, and is entitled "Sex Selective and Disability Abortion Ban." This provision bans abortions sought solely for certain enumerated reasons. Specifically, HEA 1337 provides that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," §§ 16-34-4- 4, 16-34-4-5; (2) "solely because the fetus has been diagnosed with, or has a potential diagnosis of, Down syndrome or any other disability," §§ 16-34-4- 6, 16-34-4-7; or (3) "solely

because of the race, color, national origin, or ancestry of the fetus," § 16-34-4-8. The phrase "potential diagnosis" is defined as "the presence of some risk factors that indicate that a health problem may occur." Ind. Code § 16-34-4-3. Moreover, HEA 1337 requires abortion providers to complete a form provided by ISDH that indicates, among other things, the "gender of the fetus, if detectable," and "[w]hether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability." Ind. Code § 16-34-2-5(a)(6).

Indiana law sets forth consequences for abortion providers who violate these provisions. Currently, it is a felony to knowingly or intentionally perform an abortion that is not permitted by Indiana law, and HEA 1337 does not change this. *See* Ind. Code § 16-34-2-7(a). Moreover, HEA 1337 provides that "[a] person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to: (1) disciplinary sanctions under IC 25-1-9; and (2) civil liability for wrongful death." Ind. Code § 16-34-4- 9(a).

Not only does HEA 1337 preclude abortions sought solely for one of the enumerated reasons, but the information dissemination provision requires abortion providers to inform their patients of the anti-discrimination provisions. Specifically, abortion providers must inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K).

The State presents evidence that these provisions were passed in light of technological developments

that allow the diagnosis or potential diagnosis of fetal disabilities to be made early in a pregnancy. In particular, Cell-free fetal DNA testing is able to screen for several genetic abnormalities, including Down syndrome, as early as ten weeks into pregnancy. Tests such as the Cell-free fetal DNA test are screening tests rather than diagnostic tests, and as such, only reveal the likelihood of genetic abnormality.

The parties are essentially in agreement that a significant number of women have sought, and will continue to seek, an abortion solely because of the diagnosis of a disability or the risk thereof. (*See, e.g.*, Filing No. 30-1 at 2-3) (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Moreover, the parties agree that the number of women who will seek an abortion at least in part out of these concerns will likely increase as testing is more widely available than ever before.

B. Fetal Tissue Disposition Provisions

HEA 1337 also changes the manner in which fetal tissue must be disposed. Under current Indiana law, "[a] pregnant woman who has an abortion . . . has the right to determine the final disposition of the aborted fetus." Ind. Code § 16-34-3-2. If the woman decides to let the facility performing the abortion dispose of the

fetal tissue, Indiana regulations require that the facility bury or cremate the fetal tissue. *See* 410 I.A.C. § 35-2- 1(a).

Currently, if a medical facility elects to cremate fetal tissue, it must do so by using a "crematory" or by "incineration as authorized for infectious and pathological waste." 410 I.A.C. § 35-1-3. Pathological waste includes tissues, organs, body parts, and blood or bodily fluid "that are removed during surgery, biopsy, or autopsy." Ind. Code § 16-41-16-5. Infectious waste includes pathological waste, Indiana Code § 16-41-6-4(b), and it can be destroyed through various procedures including incineration, Indiana Code § 16-41-6-3(b). Therefore, as it currently stands, the woman can determine to bury, cremate, or otherwise dispose of the fetal tissue herself, or the fetal tissue may be incinerated along with other human surgical byproducts such as organs. PPINK currently utilizes a contractor who periodically incinerates the fetal tissue along with other surgical byproducts.

HEA 1337 alters the manner in which healthcare providers must handle fetal tissue in instances where the patient does not elect to retain it and dispose of it herself. It provides that "[a]n abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated." Ind. Code § 16-34-3-4(a). A "burial transit permit" is "a permit for the transportation and disposition of a dead human body required under IC 16-37-3-10 or IC 16-37-3-12." Ind. Code § 23-14-31-5.

Moreover, HEA 1337 excludes "an aborted fetus or a miscarried fetus" from the definition of "infectious waste." Ind. Code § 16-41-16-4(d). This means that if a healthcare provider elects to use cremation rather than interment, the cremation of the fetal tissue must be performed at a crematory. However, the cremation of fetal tissue need not each be performed separately; HEA 1337 explicitly provides that "[a]borted fetuses may be cremated by simultaneous cremation." Ind. Code § 16-34-3-4(a). In exploring compliance with these new provisions, PPINK has been informed by the ISDH that its plan to aggregate "the products of conception in a container suitable for cremation and then, periodically, [have] the container delivered to a crematorium for final disposition" will comply with the statute (Filing No. 54-10 at 2).

PPINK produced evidence that compliance with the new fetal tissue disposition provisions will result in a meaningful increase in its expenses. Specifically, the annual cost of disposing fetal tissue will increase from its current level of $15,500.00, to between $36,000.00 and $63,000.00, and there will be an additional up front cost of $5,000.00 to $9,000.00 for PPINK to purchase a crypt at a cemetery and to periodically open and close the crypt to deposit the cremains (Filing No. 57-2 at 3-4).

III. DISCUSSION

To obtain a preliminary injunction, PPINK must establish the following four factors as to each provision it seeks to enjoin: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the

balance of equities tips in its favor, and (4) that issuing an injunction is in the public interest. *Grace Schools*, 801 F.3d at 795. The first two factors are threshold determinations; "[i]f the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller*, 695 F.3d at 678(quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address the first two threshold factors before addressing the final factors that it must consider.

A. Likelihood of Success on the Merits

PPINK raises constitutional challenges to three provisions of HEA 1337, which are addressed in turn.

1. Anti-Discrimination Provisions

PPINK contends that the anti-discrimination provisions clearly violate well-established Supreme Court precedent in that they prohibit women from obtaining an abortion prior to fetal viability. The State acknowledges that HEA 1337 represents a "qualitatively new kind of abortion statute," and, as such, it argues that the Supreme Court precedents on which PPINK relies do not address, and therefore, do not govern the constitutionality of these provisions (Filing No. 54 at 11).

"It is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). This

right is grounded in the right to privacy rooted in "the Fourteenth Amendment's concept of personal liberty." *Roe*, 410 U.S. at 153; *see Casey*, 505 U.S. at 846 ("[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). This right was first articulated in *Roe* but has since been repeatedly re-examined by the Supreme Court. Despite the Supreme Court's frequent revisiting of the issue, certain core principles have essentially remained unchanged since *Casey*, where a plurality of the Supreme Court reaffirmed *Roe*'s essential holding. 505 U.S. at 846. The essential holding of *Roe* has three parts:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id.[1]

The anti-discrimination provisions of HEA 1337 clearly violate the first of these principles in that they prevent women from obtaining certain abortions before fetal viability. The woman's right to choose to have an abortion pre-viability is categorical; "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before via-

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[1] Although only a plurality of the Supreme Court articulated these principles in *Casey*, subsequent Supreme Court decisions have recognized and applied these principles when considering challenges to abortion laws. *See Gonzales v. Carhart*, 550 U.S. 124, 145-46 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). In *Stenberg*, for example, a majority of the Supreme Court characterized these principles as "established" and applied them as such to Nebraska's partial birth abortion ban. 530 U.S. at 921. More recently, in *Gonzales*, the Supreme Court only "assume[d]" that these principles governed. 550 U.S. at 146. Nevertheless, federal courts have recognized that this assumption merely signaled that the Supreme Court may be open to re-evaluating those principles in the future, not that those principles no longer represented the governing law. *See, e.g., MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (acknowledging that in *Gonzales* the Supreme Court only "assume[d]" *Casey*'s principles governed, but reasoning that "[e]ven so, the [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases. Thus we, as an intermediate court, are bound by those decisions"). Indeed, the Seventh Circuit has treated these principles as binding precedent. *See Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 987 (7th Cir. 2012). Perhaps because of this, the parties do not dispute that the principles articulated in *Casey* and subsequently applied in *Stenberg* and *Gonzales* constitute binding precedent.

bility." *Casey*, 505 U.S. at 879; *id.* at 870 ("[b]efore [viability] the woman has a right to choose to terminate her pregnancy."); *Stenberg*, 530 U.S. at 920 (same); *Gonzales*, 550 U.S. at 146 (same). As stated by the Seventh Circuit, "the constitutional right to obtain an abortion is a right against coercive governmental burdens; the government may not 'prohibit any woman from making the ultimate decision to terminate her pregnancy' before fetal viability." *Planned Parenthood of Ind.*, 699 F.3d at 987 (7th Cir. 2012) (quoting *Casey*, 505 U.S. at 874, 879). Given the categorical nature of this principle, circuit courts have consistently held that any type of outright ban on certain pre-viability abortions is unconstitutional. *See MKB Management Corp.*, 795 F.3d at 773 (holding that a state law was unconstitutional because "we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions" and the challenged law "generally prohibits abortions before viability"); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (holding that a state law was unconstitutional because its "broad[] effect . . . is a categorical ban on *all* abortions between twenty weeks gestational age and viability," which "is directly contrary to the [Supreme] Court's central holding in *Casey* that a woman has the right to 'choose to have an abortion *before viability* and to obtain it without undue interference from the State'") (quoting *Casey*, 505 U.S. at 846).

Nevertheless, the State attempts to accomplish via HEA 1337 precisely what the Supreme Court has held is impermissible. The anti-discrimination provisions prohibit a woman from choosing to have an abortion pre-viability if the abortion is sought solely for one of

the enumerated reasons. For this Court to hold such a law constitutional would require it to recognize an exception where none have previously been recognized. Indeed, the State has not cited a single case where a court has recognized an exception to the Supreme Court's categorical rule that a woman can choose to have an abortion before viability. This is unsurprising given that it is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine the basis or bases upon which a woman makes her choice. *See Casey*, 505 U.S. at 846 (stating that it is a woman's "*decision* to terminate her pregnancy" that is protected by the Fourteenth Amendment) (emphasis added); *id.* at 879 ("[a] State may not prohibit any woman from *making the ultimate decision* to terminate her pregnancy before viability.") (emphasis added). Based on this categorical rule, PPINK's likelihood of success on the merits of this claim appears quite strong.

The State resists this conclusion on multiple bases. First, the State casts the anti-discrimination provisions as the next iteration of our society's prohibition on discrimination. The State points to technological advances allowing earlier and more accurate information regarding whether a fetus has a diagnosis or potential diagnosis of Down syndrome or other disabilities. These technological advances, says the State, have led in part to an increase in the number of abortions sought for reasons related to those disabilities. Because the Supreme Court has recognized that the State has a legitimate interest in protecting potential life even from the outset of a pregnancy, the

State maintains that the anti-discrimination provisions simply further its interest in protecting the potential life from discrimination.

The State is correct that the Supreme Court has consistently recognized that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. But while this is true, the State simply ignores that the Supreme Court in *Casey* "struck a balance" between this interest and a woman's liberty interest in obtaining an abortion. *Gonzales*, 550 U.S. at 146. These interests weigh differently depending on whether the fetus is viable. Before viability, the Supreme Court made clear that "the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846; *see id.* at 869 ("[a]t a later point in fetal development,"—namely, viability—"the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.").

Therefore, although the State's interest in protecting and even promoting potential life is a legitimate one, the Supreme Court has already weighed this interest against a woman's liberty interest in choosing to have an abortion and concluded that, prior to viability, the woman's right trumps the State's interest. This is the "central holding" of *Roe*, and the State's position would require this Court to undermine that holding, which of course it cannot do. *See Stenehjem*, 795 F.3d at 772 ("[t]he [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases," and thus all federal courts "are bound by those decisions"). Accordingly, the State's focus on the technological developments since *Roe* and *Casey* are unpersuasive. This

case is not about technological developments, but rather about a woman's liberty interest weighed against the State's interest in potential life. Developments in technology related to disability screening and the consequences that flow from those developments do not give this Court license to reevaluate the Supreme Court's judgment as to the balancing of these interests.

Second, the State advances a so-called "binary choice" interpretation of *Roe* and *Casey*, which, if accepted, would support the State's position that "HEA 1337 does not interfere with a right protected by *Roe* and *Casey*." (Filing No. 54 at 28.) The State's argument begins with the woman's liberty interest as articulated in *Casey*: "'the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether *to bear or beget a child*.'" *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (second emphasis added). According to the State, "[t]his right represents a binary choice: one either chooses, free of government coercion and intrusion, to 'bear or beget a child,' or one chooses to have an abortion so as not to 'bear or beget a child.'" (Filing No. 54 at 28.) The purpose of the right, continues the State, "is to prevent women from being forced to carry a child to term, even though she does not want a child at all. *Casey* and *Roe* do not create, on the other hand, a right to abort an otherwise wanted child on a discriminatory basis." (Filing No. 54 at 29.)

The difficulty with the State's position is that there is nothing in *Roe* or *Casey* that limits the right to have an abortion pre-viability to women who do not want to have a child at all as opposed to those who do

not want to see a particular pregnancy through to birth. The quote from *Casey* on which the State relies certainly does not make clear one way or another whether a woman's right to decide whether to bear a child refers to the decision to have a child generally or whether to continue a specific pregnancy. And the State does not cite a single legal authority that has recognized its binary choice theory or its proffered interpretation of *Roe* or *Casey*.

The lack of authority supporting the State's position likely stems from the fact that it is contrary to the core legal rights on which a woman's right to choose to terminate her pregnancy prior to viability are predicated. The Supreme Court has mandated that this right stems from a liberty right protected by the Fourteenth Amendment—specifically, a woman's right to *privacy*. *See Roe*, 410 U.S. at 153. Such a right "includes the interest in independence in making certain kinds of important decisions," such as whether to terminate a pregnancy. *Casey*, 505 U.S. at 859 (citation and quotation marks omitted). PPINK's claim is based on an infringement of this privacy right—the woman's right to make the important, personal, and difficult decision of whether to terminate her pregnancy. As stated above, the Supreme Court has weighed this right against the State's interest in protecting potential life and determined that the woman's privacy right—although "not . . . unlimited"—is strong enough pre-viability to preclude the State from preventing her "from making the ultimate decision to terminate her pregnancy before viability." *Casey*, Id. at 879.

Under the State's theory, a woman either wants to have a child or does not; and, once a woman chooses

the former, she cannot then terminate her pregnancy for reasons the State deems improper. But the very notion that, pre-viability, a State can examine the basis for a woman's choice to make this private, personal and difficult decision, if she at some point earlier decided she wants a child as a general matter, is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions.

The State's theory is also contrary to the reality that the decision to terminate a pregnancy involves "intimate views with infinite variations." *Id.* at 853. For example, PPINK points out, "under the State's theory there would be no constitutional protection for a woman who decides because of a loss of a job, dissolution of a marriage, illness of another child, personal illness, or the eruption of violence within the home, that she must end her pregnancy. The 'binary-choice' theory is therefore not tethered to the State's anti-discrimination rationale and would, if accepted, result in the State being able to prohibit any pre-viability abortion if the woman had not made the determination that she wanted an abortion at, or prior to, the moment of conception." (Filing No. 57 at 7.)

To summarize, nothing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman's right to choose an abortion prior to viability can be restricted if exercised for a certain reason. The right to a pre-viability abortion is categorical. Indeed, the Seventh Circuit has described "the mother's right to abort a fetus that has not yet become viable [as] essentially absolute." *Coe v. County of Cook*, 162 F.3d 491, 493 (7th Cir. 1998). This is because, despite the State's legitimate interest in potential life during the

entirety of the pregnancy, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Casey*, 505 U.S. at 846. The Supreme Court has already balanced the parties' interests and concluded that the State's pre-viability interests are simply not strong enough for it to lawfully prohibit pre-viability abortions. Yet HEA 1337 does just that. Accordingly, PPINK has a strong likelihood of success on the merits of its claim that the anti-discrimination provisions of HEA 1337 are unconstitutional.[2]

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[2] The State maintains that PPINK's challenge to the anti-discrimination provisions may be susceptible to an as-applied challenge but not to a facial challenge as a facial challenge requires PPINK to demonstrate that "'no set of circumstances exists under which the [challenged statute] would be valid.'" (Filing No. 54 at 30 (quoting *United States v. Salerno*, 481 U.S. 739 (1987))). The State is correct that a facial challenge requires the plaintiff to "establish that a law is unconstitutional in all of its applications." *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2451 (2015). As the Supreme Court very recently made clear, "the relevant denominator" when applying this test is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Whole Woman's Health v. Hellerstedt*, --- S.Ct. ----, 2016 WL 3461560, at *28 (2016) (citation and quotation marks omitted). The anti-discrimination provisions prevent any woman who seeks to have a pre-viability abortion solely for one of the enumerated reasons from obtaining one. This is an irrelevant restriction for women not seeking an abortion solely for one of these reasons. It is, however, relevant to women seeking an abortion for one of the enumerated reasons, and it is very likely unconstitutional as to all of these women. As such, it is susceptible to a facial challenge.

2. Information Dissemination Provision

HEA 1337 also requires abortion providers to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." Ind. Code § 16-34-2-1.1(a)(1)(K). Simply put, this provision requires abortion providers to inform patients of the anti-discrimination provisions discussed above.

PPINK maintains that requiring abortion providers to disseminate and patients to listen to this information violates their First Amendment rights regarding compelled speech and compelled listening, respectively. The State contends that PPINK's First Amendment claim is entirely derivative of its Fourteenth Amendment claim, in that success on PPINK's Fourteenth Amendment claim necessarily means success on its First Amendment claim. This is because, in the State's view, the only requirement the First Amendment places on these types of regulations is that the information a physician must provide be truthful and non-misleading. Therefore, the State maintains that "[i]f . . . the Court concludes that the underlying prohibition against discriminatory abortion is unconstitutional, [it] must reluctantly concede that the required statement that such abortions are not allowed would become misleading." (Filing No. 54 at 34.)

Although PPINK does not agree that its First Amendment claim is entirely derivative of its Fourteenth Amendment claim, the parties agree that, if PPINK has a strong likelihood of success on its Four-

teenth Amendment claim, it also has a strong likelihood of success on its First Amendment claim. This is because, even under the standard more favorable to the State, the State cannot compel abortion providers to provide false information; a state can only "use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576-77 (5th Cir. 2012) (quoting *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (en banc)). Given the Court's conclusion that the anti-discrimination provisions very likely violate the Fourteenth Amendment, requiring abortion providers to inform their patients that the law prohibits abortions sought for those reasons would, therefore, require abortion providers to give their patients false information. Accordingly, PPINK has a strong likelihood of success on its First Amendment challenge to the information dissemination requirements.

3. Fetal Tissue Disposition Provisions

PPINK's final challenge is to the new fetal tissue disposition provisions created by HEA 1337. PPINK contends that these requirements violate substantive due process and equal protection principles. Ultimately, the Court concludes that PPINK has a strong likelihood of success on its substantive due process claim and is entitled to an injunction on this basis alone. Therefore, the Court need not reach a conclusion on the equal protection claims.

The parties agree that the fetal tissue disposition provisions do not implicate a fundamental right.

When a fundamental right is not at stake, however, substantive due process still creates "a residual substantive limit on government action which prohibits arbitrary deprivations of liberty." *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). A law will survive such a challenge if the State can "demonstrate that the intrusion upon . . . liberty is rationally related to a legitimate government interest." *Id.*; *Charleston v. Bd. of Trustees of Univ. of Ill. at Chi.*, 741 F.3d 769, 774 (7th Cir. 2013) ("[s]ubstantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational."). It is ultimately the plaintiff's burden to demonstrate that the challenged law "lacks a rational relationship with a legitimate government interest; it is not the [government's] obligation to prove rationality with evidence." *Hayden*, 743 F.3d at 576. The plaintiff's burden is a "heavy one: So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail." *Id.*

The Court's analysis begins and ends with whether the State's asserted interest is legitimate.[3]

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[3] The State contends that PPINK's substantive due process claim fails because it does not "articulate[] the precise right it seeks to vindicate," as there is "'no abstract right to substantive due process . . . under the Constitution.'" (Filing No. 54 at 35 (quoting *Gen. Auto Serv. Station v. City of Chi.*, 526 F.3d 991, 1002 (7th Cir. 2008))). But as PPINK points out, substantive due process protects against any arbitrary or irrational use of government power. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846

The State provides multiple formulations of the interest furthered by the fetal tissue dispositions provisions: (1) "to treat fetal remains with the same dignity as other human remains," (Filing No. 54 at 35); (2) "promoting respect for human life by ensuring proper disposal of fetal remains," (Filing No. 54 at 36); and (3) ensuring "that fetal remains be treated with humane dignity," (Filing No. 54 at 38). PPINK argues that these asserted interests are insufficient because the State has no legitimate interest in ensuring that abortion providers treat fetal tissue in the same manner as human remains. Specifically, PPINK maintains that the State's asserted interest "stems from the legally indefensible assumption that embryonic and fetal tissue at any stage in the first trimester is a human being", and to accept this as a legitimate state interest "would require this Court to make a leap that the Supreme Court has refused to take to decide that human life begins at conception and that a fetus is a human being." (Filing No. 57 at 11-12.)

As an initial matter, the Court must reject as legitimate, the State's first formulation of its asserted interest. As the Seventh Circuit has noted, the Supreme Court and the cases that follow have unequivocally held that for purposes of the Fourteenth

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(1998) ("[T]he substantive due process guarantee protects against government power arbitrarily and oppressively exercised."); *Hayden*, 743 F.3d at 576 ("[T]here is a residual substantive limit on government action which prohibits arbitrary deprivations of liberty."). Moreover, the principle on which the State relies from *General Auto Service Station* does not apply here, as cases such as that involving an alleged deprivation of a property right require the identification of a specific "protected property interest." 526 F.3d at 1002.

Amendment, a fetus is not a "person." *See Coe v. County of Cook*, 162 F.3d 491, 495 (7th Cir. 1998) (citing *Roe*, 410 U.S. at 158; *Casey*, 505 U.S. at 912 [Stevens, J., concurring]; *Reed v. Gardner*, 986 F.2d 1122, 1128 (7th Cir. 1993); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997); *Crumpton v. Gates*, 947 F.2d 1418, 1421 (9th Cir. 1991)). As such, the Court can find no legal basis for the State to treat fetal remains with "the same" dignity as human remains. Stated otherwise, if the law does not recognize a fetus as a person, there can be no legitimate state interest in treating an aborted fetus *the same* as a deceased human.

For similar reasons, the State's other two formulations of its asserted interest ultimately fare no better. Although these formulations are not premised on a fetus being *the same* as a person, they are premised on the related principle that fetal tissue is entitled to a more respectful, dignified, or humane disposition because it, like human remains, in some sense represents life. However, the State does not cite any legal authority that recognizes this premise as a legitimate state interest. Although the State points to Supreme Court cases that have recognized that the State has a legitimate interest in promoting respect for potential life, these precedents do not extend to situations such as this where the potentiality for human life no longer is present.

For example, the State relies on the Supreme Court's assertion in *Gonzales* that government "may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157; *see id.* at 163 (stating that the government has an "interest in promoting respect for

human life at all stages in the pregnancy"). Similarly, in *Casey*, the Supreme Court recognized that "the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child," and that there is "a substantial state interest in potential life throughout pregnancy." 505 U.S. at 846, 876.

The difficulty with the State's reliance on these state interests, as noted above, is that they are only recognized as legitimate during the "stages in the pregnancy," *Gonzales*, 550 U.S. at 163, as this is when there is a "potential life," *Casey*, 505 U.S. at 876. As PPINK correctly points out, the Supreme Court's recognition that the government has a legitimate interest in potential life has not been extended by *Gonzales* nor any other case "to imposing procedures taken after the pregnancy has been terminated" like the fetal tissue disposition provisions do (Filing No. 57 at 13n.8). Not only do the legitimate state interests recognized by the Supreme Court not extend to the situation here, but the consistency with which the Supreme Court ties the legitimate interest to the potentiality of life. This suggests that it would not extend these principles to this context where, following an abortion, such a potentiality is no longer present.

Absent a potential life, this Court would have to determine that fetal tissue is in some respects the equivalent of human remains for the State's interest to be legitimate. This would be quite similar to a recognition that a fetus is a person, an affirmation which this Court is not allowed to make. As explained by the Seventh Circuit, the conclusion in *Roe* that a fetus is not a person "follows inevitably from the decision to grant women a right to abort. If even a first-

trimester fetus is a person, surely the state would be allowed to protect him from being killed . . . ." *Coe*, 162 F.3d at 495. The fact that recognizing a fetus as a person would undermine the right to abortion itself lends further credence to PPINK's position that the Supreme Court has intentionally not extended the legitimate state interests recognized in *Gonzales* and other cases to situations where there is no longer a potential life.

Notably, courts that have upheld requirements regarding the disposition of fetal tissue have done so by recognizing a legitimate state interest in ensuring the sanitary disposal of fetal tissue.[4] *See, e.g., Leigh v. Olson*, 497 F. Supp. 1340, 1351 (D.N.D. 1980) (recognizing that there is a legitimate state interest in regulating "the disposal of dead fetuses to protect the public health"). But the State does not attempt to justify the fetal tissue disposition provisions on this basis, likely because Indiana statutes already require that fetal tissue be disposed of in a sanitary manner.[5]

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[4] A fetal tissue disposition statute was upheld in *Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479 (8th Cir. 1990), but in that case the plaintiff "concede[d] the state has a legitimate interest in protecting public sensibilities." *Id.* at 488. Not only was no similar concession made here, but the State's asserted legitimate interest is meaningfully different in this case. For both of these reasons, the Eighth Circuit's decision is of no persuasive value here.

[5] The parties also dispute whether the Supreme Court's decision in *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983), overruled in part on other grounds by *Casey*, 505 U.S. 833, answers whether the State's asserted interest is a legitimate one. Specifically, the parties focus on a footnote in *City of Akron*, where the Supreme Court stated that, although the fetal tissue disposition statute was impermissibly vague for

In sum, the Court can find no legal support for the State's position that it has a legitimate state interest in "promoting respect for human life by ensuring proper disposal of fetal remains," (Filing No. 54 at 36), or ensuring "that fetal remains be treated with humane dignity," (Filing No. 54 at 38). The Supreme Court has made clear that a fetus is not legally a person, but the State's asserted interests are essentially that fetal tissue should be treated similarly to human remains because they are like human remains. Although the Supreme Court has recognized a legitimate governmental interest in promoting the life of a fetus during a pregnancy, such an interest is always tethered to the notion that the fetus represents a potential life and the State can legitimately promote respect for that potentiality. The Supreme Court has extended these principles no further than that, and the State has not provided a basis so that this Court can do otherwise. Therefore, any legitimate interest the State has in a potential life during a pregnancy is no longer present once the pre-viability pregnancy is terminated; and thus, it does not have a legitimate state

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a statute imposing criminal penalties, the City of Akron "remain[ed] free, of course, to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains." *Id.* As an initial matter, this statement in a footnote certainly does not constitute a holding of the Supreme Court. But perhaps more importantly, it is unclear from this statement whether by using the word "proper" the Supreme Court meant in a dignified manner or a sanitary manner. After all, the statute that was struck down mandated the "humane and sanitary" disposition of fetuses. Given that the issue and type of legal challenge in this case are substantially different than those in *City of Akron*, the Court declines to give a nonbinding and opaque statement in a footnote controlling weight.

interest in treating fetal tissue similarly to human remains.

To be clear, whether or not an individual views fetal tissue as essentially the same as human remains is each person's own personal and *moral* decision. Cf. *Roe*, 410 U.S. at 159 ("[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."). The Court cannot resolve this moral question. But as a *legal* question, there is currently no basis which would allow this Court to recognize fetal tissue as such.

Because "substantive due process requires [every law to] be rationally related to a legitimate government interest," *Charleston*, 741 F.3d at 774, and the fetal tissue disposition provisions further no legitimate interest, PPINK has a strong likelihood of success on its substantive due process claim. Accordingly, the Court need not address PPINK's equal protection challenges to these provisions.

B. Irreparable Harm

The second preliminary injunction factor requires PPINK to show "that it is likely to suffer irreparable harm in the absence of preliminary relief" as to each of the provisions it seeks to enjoin. *Grace Schools*, 801 F.3d at 795. Each of the provisions will be addressed in turn.

First, with respect to PPINK's Fourteenth Amendment challenge to the anti-discrimination provisions,

PPINK will clearly suffer irreparable harm if it is unconstitutionally prevented from providing abortions during the pendency of this litigation. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013). At the very least, it is likely that, absent an injunction, PPINK would not be able to provide surgical abortions to some women facing the difficult moral and reproductive health decision of whether to terminate a pregnancy who would otherwise do so during the pendency of this litigation. Second, the harm stemming from PPINK's related First Amendment challenge to the information dissemination provision is also irreparable. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) ("[v]iolations of First Amendment rights are presumed to constitute irreparable injuries.").

Finally, as to PPINK's challenges to the fetal tissue disposition provisions, the Seventh Circuit has recognized that, "for some kinds of constitutional violations, irreparable harm is presumed." *Ezell v. City of Chi*, 651 F.3d 684, 699 (7th Cir. 2011). Several judges in this district, including the undersigned, have concluded that this presumption of irreparable harm also applies to equal protection violations. *See, e.g., Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014); *Planned Parenthood of Ind. and Ky. v. Comm'r, Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 930 (S.D. Ind. 2013); *L.P. v. Comm'r, Ind. State Dep't of Health*, 2011 WL 255807, at *4 (S.D. Ind. 2011). Specifically, the undersigned recently held that the reasoning in *Ezell* regarding whether a violation of one's Second Amendment rights creates irreparable harm is equally applicable to violations of one's equal protection rights. *See Exodus Refugee Immigration,*

Inc. v. Pence, Case No. 1:15-cv-01858-TWP-DKL, 2016 WL 772897, at *14 (S.D. Ind. Feb. 29, 2016). This is because, like the First and Second Amendment, violations of equal protection and, here, substantive due process, "'protect[] similarly intangible and unquantifiable interests.'" *Id.* (quoting *Ezell*, 651 F.3d at 699).

The presumption of irreparable harm is applicable here. If PPINK is ultimately successful on its substantive due process challenge to the fetal tissue disposition provisions, the harm stemming from that violation is presumed irreparable. The State appears to recognize this when it acknowledges that "PPINK can establish irreparable harm only to the extent it establishes likely success on its constitutional claims." (Filing No. 54 at 41.)

Accordingly, PPINK has made the necessary showing that it will suffer some measure of irreparable harm in the absence of an injunction as to all the challenged provisions of HEA 1337.

C. Balance of Harms, Public Policy Considerations, and Sliding Scale Analysis

To obtain a preliminary injunction, the moving party must show that its case has some likelihood of success on the merits and that it has no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied. *Stuller*, 695 F.3d at 678. For the reasons stated above, PPINK has made these showings with respect to all of its claims. "If the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary

relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Id.* (quoting *Ty*, 237 F.3d at895). "The district court must also consider the public interest in granting or denying an injunction." *Id.*

After addressing these considerations, the Court "weighs the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. The Court will first address the balance of harms and public interest considerations before engaging in the sliding scale analysis of the balance of harms as compared to PPINK's likelihood of success on the merits of each of its claims. Notably, the parties' briefing regarding these factors is very limited.

1. **Anti-Discrimination and Information Dissemination Provisions**

PPINK maintains that it and its patients will suffer significant harm absent an injunction of the anti-discrimination and information dissemination provisions. Specifically, it maintains that the former will prevent numerous women from obtaining an abortion in which they have a constitutional right to obtain, and the latter will cause women to be unconstitutionally and falsely informed that they cannot obtain an abortion for certain reasons. Against these harms, the State maintains that the injunction of a democratically enacted law "'has the cost of diminishing the scope of democratic governance.'" (Filing No. 54 at 42) (quoting *Illinois Bell Tele. Co. v. WorldCom Tech.*,

Inc., 157 F.3d 500, 503 (7th Cir. 1998)). Moreover, the State contends that the anti-discrimination and information dissemination provisions "serve[] the public interest by furthering the State's interests in protecting all human life and preventing discrimination," and to enjoin these laws would prevent the State from accomplishing these goals (Filing No. 54 at 42).

Although the statistical evidence regarding how many women seek an abortion *solely* for one of the enumerated reasons is far from comprehensive or uniform, the parties are essentially in agreement that a significant number of women have sought and will seek an abortion solely because to the diagnosis or potential diagnosis of a disability. (*See, e.g.*, Filing No. 30-1 at 2-3) (attestation from the CEO of PPINK that it has and will continue to provide abortions to women who seek an abortion "solely because of a diagnosis of fetal Down syndrome or other genetic disabilities or the possibility of such a diagnosis"); Filing No. 54 at 14-15 (citing statistics regarding the percentage of fetuses diagnosed with Down syndrome that are aborted)). Absent an injunction of the anti-discrimination provisions, women who seek such an abortion will be unable to obtain one in Indiana. And absent an injunction of the information dissemination provision, abortion providers will be required to inform their patients that they are unable to obtain an abortion solely because of one of the enumerated reasons even though such a restriction is likely unconstitutional.

The harms faced by PPINK and its patients are substantial, irreparable, and significant. Difficult moral and complicated health decisions are made by women whose pregnancies are affected by a prenatal

fetal anomaly. Given the relatively short timeframe in which women may elect to terminate a pregnancy, even a short disruption of a woman's ability to do so could have significant consequences. Given this, the harm flowing from the information dissemination provision is similarly severe. Absent an injunction, women would be informed that there could be legal consequences if they choose to terminate a pregnancy for these particular reasons, which could impair a woman's ability to make her decision with "intimate views" and "with infinite variations." *Casey* at 853. These harms far outweigh the generalized harms faced by the State in the delay of the implementation of its democratically enacted law. *See Van Hollen*, 738 F.3d at 796 ("[i]t is beyond dispute that the plaintiffs face greater harm irreparable by the entry of a final judgment in their favor than the irreparable harm that the state faces if the implementation of its statute is delayed. For if forced to comply with the statute, only later to be vindicated when a final judgment is entered, the plaintiffs will incur in the interim the disruption of the services that the abortion clinics provide.").

Furthermore, the public interest would be served by enjoining these provisions as the vindication of constitutional rights serves the public interest. *See Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) ("[s]urely, upholding constitutional rights serves the public interest.") (quoting *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir.2003)); *see also Preston*,589 F.2d at 303 n.3 ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm, and

its remedy certainly would serve the public interest."). Although the State is undoubtedly correct that the public interest is served as a general matter by eliminating discrimination in our society, the injunction here seeks to ensure that the State does not do so in a way that very likely violates the Constitution, which is in the public interest.

Having examined all of the relevant factors, the Court must "weigh[] the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. As to the anti-discrimination and information dissemination provisions, the sliding scale analysis is straightforward: PPINK is very likely to succeed on its challenges to these provisions and the balance of harms weigh heavily in its favor. Accordingly, it is clear that PPINK is entitled to a preliminary injunction prohibiting the enforcement of the anti-discrimination and information dissemination provisions pending the resolution of this litigation.

2. Fetal Tissue Disposition Provisions

The Court turns next to the fetal tissue disposition provisions. In arguing that the balance of harms weighs in its favor, PPINK primarily relies on the presumed harm that flows from a substantive due process violation discussed above. The State, for its part, focuses on the same harm discussed above regarding the cost of enjoining democratically enacted laws, as well how an injunction will prevent the State from

providing enhanced dignity to fetal tissue that the State believes is warranted. Lastly, the parties dispute how the Court should weigh the financial harm the fetal tissue disposition provisions will cause PPINK.

The Court views the parties' generalized harms as essentially equal. PPINK is correct that there is a certain level of irreparable harm that flows from every constitutional violation, yet the State is correct that it has a legitimate interest in enforcing democratically enacted laws. As to the financial impact these provisions will have on PPINK, the evidence reveals that they will increase the annual cost of disposing fetal tissue from its current level. (Filing No. 57-2 at 3-4). Although not an overwhelming sum, it will undoubtedly have a financial impact on PPINK and possibly its patients. Given this, the balance of harms weighs slightly in PPINK's favor.[6] Moreover, as to the public interest considerations, for the same reasons discussed above, these considerations do not preclude an injunction given that the fetal tissue disposition provisions are likely unconstitutional. *See Joelner*, 378 F.3d at 620.

With the foregoing analysis in mind, the Court must again "weigh[] the balance of potential harms on a 'sliding scale' against the movant's likelihood of success: the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is

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[6] Given the Court's ultimate weighing of the factors, the Court need not resolve whether the financial harm to PPINK is irreparable. (See Filing No. 57 at 17 (arguing that the financial harm is irreparable because the State is "protected from damages liability by the Eleventh Amendment")). Even if it is not, PPINK would be entitled to a preliminary injunction.

to win, the more it must weigh in his favor." *Turnell*, 796 F.3d at 662. The sliding scale analysis is more difficult with respect to the fetal tissue disposition provisions than it is regarding the other two challenged provisions. Critical to the Court's analysis is the Seventh Circuit's reminder that "[t]he sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller*, 695 F.3d at 678 (citation and internal quotation marks omitted). "Stated another way, the district court 'sit[s] as would a chancellor in equity' and weighs all the factors, 'seeking at all times to minimize the costs of being mistaken.'" *Id.* (quoting *Abbott Labs.*, 971 F.2d at 12).

That said, PPINK is likely to succeed on its substantive due process challenge to the fetal tissue disposition provisions and the balance of harms weighs, albeit slightly, in its favor. Given PPINK's likelihood of success, it does not need the balance of harms to weigh in its favor in order to be entitled to an injunction. But it does. Accordingly, it is clear that PPINK is entitled to a preliminary injunction prohibiting the enforcement of the fetal tissue disposition provisions pending the resolution of this litigation.

In sum, the Court has "weigh[ed] all the factors" and sought "at all times to minimize the costs of being mistaken.'" *Stuller*, 695 F.3d at 678. It has done so in light of the Supreme Court's warning that "injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is en-

titled to such relief." *Winter*, 555 U.S. at 376. Nevertheless, PPINK has demonstrated that it is entitled to the injunction it seeks.

IV. CONCLUSION

The United States Supreme Court has stated in categorical terms that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. It is clear and undisputed that until *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey* are overturned by the United States Supreme Court, this Court is bound to follow that precedent under the rule of *stare decisis*. *See Casey*, 505 U.S. at 870, 112 S.Ct. 2791 (stating that the doctrine of *stare decisis* requires reaffirmance of *Roe's* essential holding recognizing a woman's right to choose an abortion before fetal viability); *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900 (D. N.D . 2013) ("[n]o judge in the United States can overrule *Roe v. Wade*; only the Supreme Court can do so"); *Sojourner v. Roemer*, 772 F. Supp. 930, 932 (E.D. La. 1991).

PPINK has clearly demonstrated that the anti-discrimination provisions and the information dissemination provision should be enjoined pending resolution of this litigation. It is likely to succeed on the merits of its challenges to these provisions as the anti-discrimination provisions directly contravene well-established law that precludes a state from prohibiting a woman from electing to have an abortion prior to fetal viability. Similarly, the information dissemination provision is likely unconstitutional as it requires

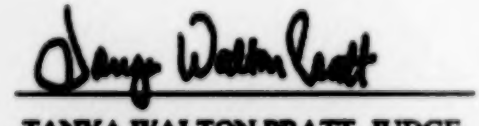
abortion providers to convey false information regarding the anti-discrimination provisions to their patients. PPINK faces irreparable harm of a significantly greater magnitude if these provisions are not enjoined than that faced by the State.

Second, PPINK has persuasively shown that the fetal tissue disposition provisions do not further a legitimate state interest and thus are likely unconstitutional. This, when combined with the fact that the balance of harms weighs slightly in PPINK's favor, leads to the conclusion that PPINK is also entitled to an injunction with respect to these provisions.

Accordingly, PPINK's Motion for Preliminary Injunction is **GRANTED**. (Filing No. 7.) Pursuant to Federal Rule of Civil Procedure 65(d), the Court **ISSUES A PRELIMINARY INJUNCTION** prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions. Because the State has not disputed PPINK's position that the State will not incur monetary damages from an injunction, PPINK need not post a bond.

SO ORDERED.

Date: 6/30/2016



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 25, 2018

By the Court[*]:

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-00763-TWP-DML

Tanya Walton Pratt, *Judge.*

ORDER

Defendants-appellants have requested en banc review in this case limited only to the question of the constitutionality of Ind. Code § 16-34-3- 4, which regulates the disposal of fetal remains after an abortion or miscarriage. On June 8, 2018, the court granted the

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[*] Judge Scudder took no part in the consideration or decision of this matter.

petition and vacated Part II.B of the panel's opinion of April 19, 2018, *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. State Dept. of Health*, 888 F.3d 300, 307–10 (7th Cir. 2018). However, information coming to the attention of a member of the court caused that judge to conclude that recusal was necessary and that the judge had been ineligible to vote on the petition for rehearing en banc. Taking into account that judge's recusal, the vote of the circuit judges in regular active service was evenly divided, and thus the necessary majority required by 28 U.S.C. § 46(c) for rehearing en banc was, and is, not present. Judges Easterbrook, Kanne, Sykes, Barrett, and Brennan voted to grant rehearing en banc. We therefore **VACATE** the order of June 8, 2018, and reinstate the panel's opinion.

WOOD, *Chief Judge*, with whom *Circuit Judges* ROVNER and HAMILTON join, concurring. Not every case in a highly controversial area deserves to be reheard by the *en banc* court. Just as the Supreme Court passes by many potentially interesting and important cases when it exercises its *certiorari* jurisdiction, particularly when either the facts or the law may stand in the way of a clean decision on the merits of the issue that concerns the Court, we must exercise the same restraint. Unless it is possible to identify a properly presented, important issue of law that lies within the power of this court to resolve, we should refrain from rolling out the big guns of the full court. Otherwise we risk issuing what would be at best an opinion correcting an error made by a panel, and at worst an advisory letter to the Supreme Court. The present case is not one that meets those criteria. Idiosyncratic procedural hurdles would block our ability

to conduct a thorough review of the only issue the state of Indiana has asked us to rehear—the constitutionality of the fetal disposal provisions of House Enrolled Act No. 1337, Ind. Code §§ 16-34-3- 4(a), 16-41-16-4(d), 16-41-16-5, and 16-41-16.7.6.

The state has not asked for rehearing *en banc* of the panel's ruling on the Sex Selective and Disability Abortion Ban, Ind. Code § 16-34-4, and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which holds unequivocally that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents"). The state's decision in this respect amounts to a waiver of its right to have this court reconsider that part of the panel's decision. In light of that waiver, I do not address that part of the case. The Supreme Court does not need essays from different federal judges to assist its own thinking. Should the state seek further review, I am confident that the parties will brief the issue ably, and that numerous *amicus curiae* contributions will also be filed. My focus instead is on the issue that was presented to us: the fetal disposal rules.

Planned Parenthood conceded that the disposal regulation does not implicate a fundamental right, and it then moved directly to the conclusion that the proper level of inquiry was rational-basis review. The panel properly decided the case in light of that strategic litigation choice. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888

F.3d 300, 307–08 (7th Cir. 2018). In doing so, the panel ably applied that level of scrutiny. I have little to add to its analysis except to wonder how, if respect for the humanity of fetal remains after a miscarriage or abortion is the state's goal, this statute rationally achieves that goal when it simultaneously allows any form of disposal whatsoever if the mother elects to handle the remains herself. It is not hard to hypothesize disposal methods that would be far less respectful than those presently used for biological materials in clinics.

The problem, however, is that the parties' concession with respect to the standard of review—a choice that is capable of dictating the outcome—was probably incorrect. Without that concession, the court's review would have taken a different turn. This case involves a fundamental right: the woman's right to decide whether to carry a child (or, put negatively, whether to have an abortion). *See Roe v. Wade*, 410 U.S. 113 (1973). In my view, statutes such as Indiana's cannot properly be examined if the question of the standard of review is off the table, as it was for our panel.

In many cases, that choice will be outcome determinative. A look at the relevant Supreme Court decisions strongly suggests that rational-basis is not the proper level of scrutiny. The disposal of an aborted (or miscarried) fetus is just the final step in the overall process of terminating (or losing) a pregnancy. It thus implicates an interest with heightened constitutional protection: "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846. Therefore, the question for this court should

have been whether the law "has the effect of placing a substantial obstacle in the path of a woman's choice." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Casey*, 505 U.S. at 877). To move forward with this case as if rational-basis were the proper standard would force us to decide an important issue with blinders on. The court would need to ignore the Supreme Court's admonition not to "equate the judicial review applicable to the regulation of a constitutionally protected personal liberty interest with the less strict review applicable where, for example, economic legislation is at issue." *Whole Woman's Health*, 136 S. Ct. at 2309. The fact that fetal-disposal regulations potentially affect the constitutional right to obtain a pre-viability abortion distinguishes this law from the countless cases that do not implicate a constitutional right—say, animal-welfare statutes. There are plenty of rationally enacted laws that do not burden any constitutional rights.

It does not matter for the constitutional concerns presented in this case that the disposal statute operates at the end of the procedure. Hypotheticals should make that point clear. A post-procedure spousal notification law, perhaps enforced by a criminal penalty, is no less a substantial obstacle than a pre-procedure notification requirement. And I expect that any woman would experience an undue burden on her right to have a pre-viability abortion if state law required her to check herself into a mental hospital for a week after the procedure was complete. In keeping with these principles, other courts have applied not the rational-basis standard, but the undue-burden standard, when considering the lawfulness of fetal remains regulations. See *June Med. Servs. LLC v. Gee*,

280 F. Supp. 3d 849 (M.D. La. 2017); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1098 (E.D. Ark. 2017), appeal filed, No. 17-2879 (8th Cir. Aug. 28, 2017); *Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 227–29 (W.D. Tex. 2017).

The forced limitation of this case to the rational-basis standard would distort any *en banc* consideration we could give. It is entirely possible that a state law would pass rational-basis, one-step-at-a-time, review, but would nonetheless impose an undue burden on a women's choice to have an abortion. The examples reviewed in *Casey* are good illustrations. That possibility suggests that leaving the panel's decision intact is unlikely to spell the end of fetal disposal litigation even in this circuit. Every nuance in this area is litigated over and over. Nor does our denying the motion for rehearing bring to an end litigation already progressing across the country. See, *e.g.*, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. appeal docketed Aug. 28, 2017); *June Med. Servs. LLC v. Gee*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. docketed July 1, 2016); *Whole Woman's Health v. Smith*, No. 1:16-cv-01300-DAE-AWA (W.D. Tex. docketed Dec. 12, 2016). If the Supreme Court wants to take some aspect of this issue, it will have ample opportunity to do so.

Moreover, further review of this case would necessarily proceed without the benefit of a record developed with the proper legal standard in mind. Given the posture in which this case comes before us, it is unremarkable that, as Judge Easterbrook observes, plaintiffs have not contended or shown that the fetal disposal statute is a substantial obstacle. Easterbrook, J., dissenting, *post* at slip op. 7. Litigating on a

"rational-basis" standard makes such evidence unnecessary; under the proper standard of review, however, evidence does make a difference, and it should be developed before the court charges headlong into such an important issue. And that is not the only evidence currently missing as a result of a misapprehension of the standard of review. For example, the evidence is thin to nonexistent on the costs imposed by the disposal regulations—costs that include not only a higher out-of-pocket dollar price for the procedure, but that might include psychological trauma that chills women from seeking abortions or medical care in relation to miscarriages because of the potential stigmatizing impact of these measures. Nor did the plaintiffs have reason to explore how the disposal statute might work in tandem with other regulations in a way that unduly burdens the right to choose, as is required under *Whole Women's Health*. 136 S. Ct. at 2309, 2313. The record simply did not explore what should have been the central issues and what are likely to be the primary points of contention in the next case to come along.

It would be a waste of this court's resources to accept a case for *en banc* review if the only thing we could say is that the parties' decision to use rational-basis review is binding on us, but that everything might be different if the standard from *Casey* and *Whole Women's Health* were applied and a proper record in light of that standard had been developed. It would not quite be a hypothetical case, but it would be too close for comfort. Important as these issues are, the only prudent course to take is to forgo *en banc* review this time and await a case that more cleanly presents all relevant issues.

I therefore concur in the decision to deny rehearing *en banc*.

EASTERBROOK, *Circuit Judge*, with whom *Circuit Judges* SYKES, BARRETT, and BRENNAN join, dissenting from the denial of rehearing en banc. This case concerns two statutes. The first, which I call the eugenics statute, makes it illegal to perform an abortion for the purpose of choosing the sex, race, or (dis)abilities of a child. Ind. Code §§ 16-34-4-1 to 16-34-4-9. The second, which I call the disposal statute, requires fetal remains to be cremated or buried; they cannot be placed in medical trash, although the remains of multiple fetuses may be incinerated together. Ind. Code. §§ 16-34-3-4(a), 16-41-16-4(d), 16-41-16-5, 16-41-16-7.6.

The panel held the eugenics statute unconstitutional because the lead opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (O'Connor, Kennedy & Souter, JJ.), says that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." The panel held the disposal statute unconstitutional because fetal remains are not remains of "persons" within the scope of the Due Process Clause, see *Roe v. Wade*, 410 U.S. 113, 158–59 (1973), making it irrational to require them to be treated as if they were. See 888 F.3d 300, 305–07 (eugenics statute), 307–10 (disposal statute) (7th Cir. 2018).

I am skeptical about the first of these conclusions because *Casey* did not consider the validity of an anti-eugenics law. Judicial opinions are not statutes; they resolve only the situations presented for decision.

Consider a parallel in private law. Judges often said that employers could fire workers for any or no reason. That's the doctrine of employment at will. But by the late twentieth century courts regularly created exceptions when the discharge was based on race, sex, or disability. *Casey* does not tell us whether a parallel "except" clause is permissible for abortions.

Casey and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered.

None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children. It is becoming possible to control some aspects of embryos' genomes. See Clyde Haberman, *Scientists Can Design 'Better' Babies. Should They?*, NEW YORK TIMES, June 10, 2018. States may regulate that process when conception is by *in vitro* fertilization. Does the Constitution supply a right to evade regulation by choosing a child's genetic makeup after conception, aborting any fetus whose genes show a likelihood that the child will be short, or nearsighted, or intellectually average, or lack perfect pitch—or be the "wrong" sex or race? *Casey* did not address that question. We ought not impute to the Justices decisions they have not made about problems they have not faced.

Still, Indiana has not asked us to rehear this part of the panel's decision. Only the Supreme Court can

determine the answer; we might guess, but the Justices can speak authoritatively. So although 18 states have filed an *amicus* brief asking us to rehear this part of the decision en banc, I am content to leave it to the Supreme Court.

The panel's holding on the disposal statute is another matter, because "X is not a person" does not imply "X is beyond regulatory authority." Think of animal-welfare statutes. Dogs may not be beaten for fun. Bullfights are forbidden. Horses may not be slaughtered in Illinois for the dinner table under a statute this circuit sustained largely on animal-welfare grounds. See *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007). Accord, *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007). Many states have laws that prescribe how animals' remains must be handled. See, e.g., Ala. Code §3-1-28; Ga. Code §4-5-5; Iowa Code §167.18(1); Kan. Stat. §47-1219; Mich. Comp. Laws §287.671(2); Mo. Stat. §269.020; 3 Pa. Stat. §2352(a)(4); Utah Code §4-31-102(1); Wis. Stat. §95.50; Wyo. Stat. §35-10-104. The panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils.

Animal-welfare statutes are rational not simply because all mammals can feel pain and may well have emotions, but also because animal welfare affects human welfare. Many people feel disgust, humiliation, or shame when animals or their remains are poorly treated. We wrote in *Cavel* that a ban on slaughtering horses for human consumption is rationally related to the goal of reducing dismay at poor treatment of these creatures. 500 F.3d at 557. Isn't that equally true of a statute about fetal remains?

In giving a negative answer, the panel created a conflict with *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The Eighth Circuit sustained a statute equivalent to Indiana's. The majority distinguished *Minnesota* on the ground that Planned Parenthood of Minnesota conceded that the state has a legitimate interest in protecting public sensibilities, while Planned Parenthood of Indiana and Kentucky denies that. 888 F.3d at 309. This shows a difference in litigation strategies, but to deny that public sensibilities can matter (as the panel did) creates a conflict with decisions in many circuits, on subjects ranging from animal welfare to aesthetic zoning to obscenity. Many a state law promotes public morals in a way that John Stuart Mill would disapprove, but he was not among the drafters of the Fourteenth Amendment. (The overlap between Mill's *On Liberty* and Mr. Herbert Spencer's *Social Statics* is considerable, but Justice Holmes's dissent in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905), has prevailed and *Social Statics* is not part of the Constitution. Neither is *On Liberty*.)

The panel went on to observe that Indiana is concerned about the interest of the fetus, while Minnesota isn't. This implies that the same statute could be passed again in Indiana, and held valid, as long as the legislative history is different. Yet the intent behind a law does not affect rational-basis analysis. A law is valid if a rational basis can be imagined, no matter what legislators thought or said. See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–17 (1993). The panel also observed that the disposal statute does not prevent a woman from taking possession of the fetal remains and disposing of them as she

pleases, 888 F.3d at 309, which is true but irrelevant. A state need not regulate comprehensively in order to regulate at all. See, e.g., *Bowen v. Owens*, 476 U.S. 340, 347 (1986). It may take one step at a time.

Plaintiffs have not argued that the disposal statute places a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (lead opinion), quoted and applied in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The disposal statute operates after the abortion is complete. The costs of satisfying the statute may be rolled into the procedure's price and so in principle could affect a woman's decision to have an abortion. But plaintiffs do not contend, and the record does not show, that the costs are substantial. (They estimate an incremental cost of $6 to $12 but do not explain how the figure was derived.) I could not find data suggesting that the price of an abortion in Minnesota rose at all after it adopted a disposal statute, that abortion services there have become harder to procure, or that the number of abortions has been affected. Rational-basis analysis therefore is the appropriate approach, and our panel did not follow the Supreme Court's rules for rational-basis inquiry. There is no need to leave this matter to the Justices; rehearing en banc is preferable to a constitutional decision preventing Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation.

Chief Judge Wood observes that plaintiffs' litigation choices, including their decision to produce "thin to nonexistent" (slip op. 4) evidence about the effects of the disposal statute, prevent us from deciding

whether this law puts a "substantial obstacle" in a woman's path. She invites future litigants to supply more evidence and make different legal arguments. But if more than 25 years' experience in Minnesota does not furnish evidence of a substantial obstacle, where would it come from? And why would any other litigant choose a different strategy? Now that the disposal statute has been held to lack a rational basis, there will be no more litigation in this circuit, no opportunity for the full court to consider other lines of argument. Kicking the can down the road is not an attractive option, for we have reached the road's end.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 8, 2018

By the Court:

No. 17-3163

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-00763-TWP-DML

Tanya Walton Pratt, *Judge.*

ORDER

Defendants-appellants have requested en banc review in this case limited to the question of the constitutionality of Ind. Code § 16-34-3-4, which regulates the disposal of fetal remains after an abortion or miscarriage. A majority of the judges in active service have voted to grant the state's petition. Accordingly, the petition for rehearing en banc is **GRANTED**. Part II.B of the panel's opinion of April 19, 2018, *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of the Ind.*

State Dept. of Health, 888 F.3d 300, 307–10 (7th Cir. 2018), is **VACATED**, and the judgment is also **VACATED** insofar as it affirmed the district court's decision to enjoin enforcement of the fetal disposition statute. The court will set a date for the en banc oral argument by separate order.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

June 25, 2018

Before: WILLIAM J. BAUER, Circuit Judge
JOEL M. FLAUM, Circuit Judge
DANIEL A. MANION, Circuit Judge

No. 17-3163	PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Plaintiffs - Appellees v. COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, et al., **Defendants - Appellants**

District Court No: 1:16-cv-00763-TWP-DML
Southern District of Indiana, Indianapolis Division
District Judge Tanya Walton Pratt

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on April 19, 2018, as reinstated on June 25, 2018.

Indiana Code 16-34-4

Sec. 1. (a) As used in this chapter, "any other disability" means any disease, defect, or dis-order that is genetically inherited. The term includes the following:

(1) A physical disability.

(2) A mental or intellectual disability.

(3) A physical disfigurement.

(4) Scoliosis.

(5) Dwarfism.

(6) Down syndrome.

(7) Albinism.

(8) Amelia.

(9) A physical or mental disease.

(b) The term does not include a lethal fetal anomaly.

Sec. 2. As used in this chapter, "Down syndrome" means a chromosomal disorder associated with an extra chromosome 21 or an effective trisomy for chromosome 21.

Sec. 3. As used in this chapter, "potential diagnosis" refers to the presence of some risk factors that indicate that a health problem may occur.

Sec. 4. As used in this chapter, "sex selective abortion" means an abortion that is per-formed solely because of the sex of the fetus.

Sec. 5. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking a sex selective abortion.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking a sex selective abortion.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 6. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 7. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with any other disability or has a potential diagnosis of any other disability.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with any other disability or has a potential diagnosis of any other disability.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 8. (a) A person may not intentionally per-form or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of postfertilization age if the per-son knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.

(b) A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization age if the person knows that the pregnant woman is seeking the abortion solely because of the race, color, national origin, or ancestry of the fetus.

(c) This section is severable as specified in IC 1-1-1-8.

Sec. 9. (a) A person who knowingly or intentionally performs an abortion in violation of this chapter may be subject to:

(1) disciplinary sanctions under IC 25-1-9; and

(2) civil liability for wrongful death.

(b) A pregnant woman upon whom an abor-tion is performed in violation of this chapter may not be prosecuted for violating or conspiring to violate this chapter.

Indiana Code 16-34-2-1.1(a)(1)(K)

(1) At least eighteen (18) hours before the abortion and in the private, not group, presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IC 25-27.5-2-10), an advanced practice registered nurse (as defined in IC 25-23-1-1(b)), or a certified nurse midwife (as defined in IC 34-18-2-6.5) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has informed the pregnant woman orally and in writing of the following:

. . .

(K) That Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability.

Indiana Code 16-34-3-4

Sec. 4. (a) An abortion clinic or health care facility having possession of an aborted fetus shall provide for the final disposition of the aborted fetus. The burial transit permit requirements of IC 16-37-3 apply to the final disposition of an aborted fetus, which must be interred or cremated. However:

(1) a person is not required to designate a name for the aborted fetus on the burial transit permit and the space for a name may remain blank; and

(2) any information submitted under this section that may be used to identify the pregnant woman is confidential and must be redacted from any public records maintained under IC 16-37-3.

Aborted fetuses may be cremated by simultaneous cremation.

(b) The local health officer shall issue a permit for the disposition of the aborted fetus to the person in charge of interment for the interment of the aborted fetus. A certificate of stillbirth is not required to be issued for an aborted fetus with a gestational age of less than twenty (20) weeks of age.

(c) IC 23-14-31-26, IC 23-14-55-2, IC 25-15-9-18, and IC 29-2-19-17 concerning the authorization of disposition of human remains apply to this section.